

IN THE CHANCERY III COURT OF DAVIDSON COUNTY, TENNESSEE  
AT NASHVILLE

PHIL BREDESEN, GOVERNOR OF THE	)	
STATE OF TENNESSEE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 06-2275-I (III)
	)	
TENNESSEE JUDICIAL SELECTION	)	
COMMISSION,	)	
	)	
Defendant.	)	

---

SUMMARY JUDGMENT HEARING

BEFORE: CHANCELLOR ELLEN HOBBS LYLE

DECEMBER 13, 2006

---

LISA H. STONE, CCR, RPR  
STONE & GEORGE COURT REPORTING  
Post Office Box 3544  
Brentwood, TN 37024-3544  
(615) 221-1089

ORIGINAL

1 APPEARANCES:

2

3 For Governor Phil Bredesen:  
4 Ms. Janet M. Kleinfelter  
5 State of Tennessee Attorney General  
6 -and-  
7 Mr. Robert E. Cooper, Jr.  
8 State of Tennessee Attorney General

6

7

8 For Mr. Houston Gordon:  
9 Mr. Charles W. Bone  
10 Attorney at Law  
11 -and-  
12 Mr. Charles Robert Bone  
13 Attorney at Law

11

12 For the Tennessee Judicial Selection Committee:  
13 Mr. Ben Cantrell  
14 Attorney at Law

14

15 For Mr. George Lewis:  
16 Mr. John Hicks  
17 Attorney at Law

17

18

19

20

21

22

23

24

25

## 1 PROCEEDINGS

2 THE COURT: Good morning. This is a  
3 hearing on cross motions for summary judgment.

4 I have some preliminary matters I want  
5 to take up with the lawyers, but before we do that, for  
6 the benefit of the record and the court reporter, I'm  
7 going to ask that each lawyer stand up, state your  
8 name, and state the party you're representing so our  
9 court reporter can keep track of our speakers as we go  
10 through the argument. Then after we've had those  
11 introductions, there are a few matters I'd like to  
12 discuss with counsel.

13 MS. KLEINFELTER: Janet Kleinfelter,  
14 with the Attorney General's Office, on behalf of  
15 Governor Bredesen.

16 MR. CANTRELL: Please the Court, I'm Ben  
17 Cantrell of the Nashville Bar, representing the  
18 Defendant, the Judicial Selection Commission.

19 MR. HICKS: Good morning, Your Honor.  
20 I'm John Hicks of the Nashville Bar, and I represent  
21 George Lewis, one of the intervenors.

22 MR. CHARLES W. BONE: Good morning, Your  
23 Honor. I'm Charles W. Bone, and I represent Houston  
24 Gordon.

25 THE COURT: Thank you. The first matter

1 I would like to take up is the affidavit that was filed  
2 yesterday by Mr. Gordon.

3 Mr. Bone, I'm going to ask that you  
4 present all of those matters within your portion of the  
5 argument. I will not take it up as a preliminary  
6 matter. Okay?

7 MR. CHARLES W. BONE: Thank you, Your  
8 Honor.

9 THE COURT: And the other clarification  
10 that I needed: What order are we going to go in in  
11 terms of the Commission and the intervenors?

12 MR. HICKS: Your Honor, thank you. I'm  
13 John Hicks again. The defendant and the intervenors  
14 agreed yesterday, based on Your Honor's order, that we  
15 would divide up the time with Mr. Lewis having 45  
16 minutes, Mr. Gordon having 45 minutes, and the  
17 Selection Commission having an hour. I'm --

18 THE COURT: You know you don't have to  
19 take all that time. You've got it --

20 MR. HICKS: -- Your Honor, I understand  
21 that.

22 THE COURT: That wasn't an invitation to  
23 use all that time, but that's what I will allocate to  
24 you if that's how you would like to divide it up.

25 MR. HICKS: That's how it's divided up,

1 Your Honor, and I'm sure that some of us will be ceding  
2 some time to others.

3 THE COURT: Okay. Thank you. Those are  
4 all the matters that I needed to take up with counsel.  
5 Are there any questions from the lawyers? Anybody got  
6 any?

7 MS. KLEINFELTER: No, we don't have any.

8 THE COURT: Then let's begin.

9 MS. KLEINFELTER: Good morning, Your  
10 Honor. I'm Janet Kleinfelter, with the Attorney  
11 General's Office, and I'm here on behalf of Governor  
12 Bredesen.

13 This is a lawsuit that was originally  
14 brought by Governor Bredesen as a declaratory judgment  
15 action, seeking to have an order from this Court  
16 interpreting and construing what his rights and duties  
17 and responsibilities are, as well as that of the  
18 Judicial Selection Commission, in the context of  
19 appointing individuals to fill vacancies on the  
20 Tennessee Supreme Court under the Tennessee Plan.

21 And more specifically, we were looking  
22 at the language in Tennessee Code Annotated  
23 17-4-112(a), and to get really specific, it's that  
24 language, what did the Legislature intend when they  
25 used the language that if the Governor rejects, he can

1 require the Commission to send up one other panel of  
2 three nominees, and what was meant by that.

3 And, of course, Your Honor, after the  
4 Governor filed the lawsuit, it's morphed into something  
5 a little bit bigger than just that original declaratory  
6 judgment action, with the affirmative defenses that  
7 were raised by the Judicial Selection Commission, as  
8 well as the issues that were raised by the intervenors,  
9 Mr. Gordon and Mr. Lewis.

10 And Your Honor, your order of December  
11 the 6th identified essentially four issues that you  
12 wanted the attorneys to brief and to be prepared to  
13 discuss with this Court and broke them down into, I  
14 think, two separate categories.

15 One category was that of preemptive  
16 defenses, which obviously, if the Court were to rule in  
17 favor of the Commission or the intervenors, would  
18 preempt the need to reach the issue that the Governor  
19 has put forth in his Complaint.

20 Alternatively, if the Court were to rule  
21 in the Governor's favor and find in the Governor's  
22 favor on those three preemptive issues, then it would  
23 be necessary to reach that primary issue presented by  
24 the Governor as to what is meant by one other panel.

25 So to that extent, I think it's prudent

1 for me to address those preemptive defenses first,  
2 because we believe that none of those defenses have  
3 merit and can establish that there is a need to not  
4 reach the issue presented by the Governor.

5 And the first one is, is an issue that  
6 has only been raised by the intervenor, Mr. Gordon, and  
7 that is with respect to the validity of the panel that  
8 was submitted to the Governor on July 18th by the  
9 Judicial Selection Commission.

10 And essentially Mr. Gordon's argument  
11 is, is that, under the statute, the Governor had to  
12 have a panel of three nominees to choose from, and that  
13 when Chancellor Dinkins sent his letter on July 24th  
14 representing that he no longer be considered for  
15 nomination, no longer be considered for appointment,  
16 that that somehow unilaterally destroyed the fact that  
17 he'd been nominated by the Commission, and it destroyed  
18 the validity of the panel itself and preempted any  
19 authority that the Governor had to act on that panel,  
20 whether to even consider the panel, much less make an  
21 appointment from the panel or reject the panel.

22 And Your Honor, the problem with that  
23 argument is that it's premised on a false assumption,  
24 and the false assumption is, is that the unilateral  
25 action of a nominee can have those results, can, one,

1 result in altering the fact that the individual was  
2 nominated by the Judicial Selection Commission, that it  
3 can essentially erase that historical fact. And the  
4 second is that it can destroy the opportunity of the  
5 other two nominees to even be considered for  
6 appointment. There's nothing in the statutory language  
7 of the statute that would support that nor in the  
8 legislative history.

9           As we pointed out in our brief, the Act  
10 only gives authority to two parties to act with respect  
11 to the appointment to fill vacancies.

12           In the first instance, under 17-4-109,  
13 the Commission is given the authority to select and  
14 nominate three people. And Your Honor, it's undisputed  
15 by all the parties that the Commission, in fact, on  
16 July 18th, did select, by majority vote, and nominated  
17 three persons and submitted those three persons to the  
18 Governor. There's no dispute about that fact.

19           And under the statute, once they've done  
20 that, when you look at -- that's the very last thing in  
21 17-4-109(e). That's the very last thing that they're  
22 given the authority to do.

23           And once they've done that, they don't  
24 have any further authority to act under the statute.  
25 There's no authority in the instance that a nominee



1 later says I'm not willing to serve, or if a nominee  
2 dies unexpectedly or some other post-nomination fact  
3 event occurs that affects the ability or the  
4 willingness of a nominee to serve, there's nothing in  
5 the statute that says, oh, okay, Commission, you know,  
6 you have the right to name another nominee, certify  
7 another nominee, or, as Mr. Gordon has asserted, to  
8 even do a complete do-over and submit a whole new  
9 panel.

10 The certification of nominees occurred  
11 on July 18th -- of three nominees -- occurred on July  
12 18th. That then triggered the Governor's authority to  
13 act.

14 The Governor's given the authority,  
15 under the Act, to either appoint -- and I think, again,  
16 it's important to look at the language of the  
17 statute -- to appoint one of the three persons  
18 nominated. It doesn't say that he shall appoint from  
19 the panel. It says he will appoint one of the three  
20 persons nominated or he can reject.

21 And it's only if he rejects does that  
22 trigger any further authority on the part of the  
23 Commission to act, in which instance they are required  
24 to send up that one other panel of three nominees.

25 But there's no authority that is given

1 to a nominee to effect that authority given to the  
2 Commission and to the Governor, and certainly no  
3 authority to share in that power, to say I'm going to  
4 somehow destroy that power that's been given to the  
5 Governor and to the Commission --

6 THE COURT: Let me go through with you a  
7 different -- a little bit different analytical model on  
8 that --

9 MS. KLEINFELTER: Certainly.

10 THE COURT: -- so I can ask you some  
11 questions.

12 Let's assume that the requirement that  
13 the Governor have three nominees to consider is, let's  
14 just say, a condition precedent to his right to reject  
15 or select. Okay? Let's assume that for a moment.

16 MS. KLEINFELTER: Okay.

17 THE COURT: If it is a condition  
18 precedent, then I guess the question is, when  
19 Chancellor Dinkins withdrew, did that cause the  
20 condition to fail. You say it didn't because the  
21 condition is simply that three nominees be certified.

22 The implication in the other sides'  
23 papers is, well, it's not just that three nominees be  
24 certified but that we have people who will serve, folks  
25 that can be considered by the Governor.

1                   In analyzing that argument, the Court  
2 saw, in 17-4-109(d), that it says the Commission shall  
3 make an investigation and inquiry and shall endeavor to  
4 encourage qualified attorneys to agree to serve if  
5 appointed. So it encourages them, and they're to  
6 endeavor to do that.

7                   But then it goes on, in E, to say that  
8 they are required, then, to nominate people who are  
9 best qualified and available to fill it.

10                  Having said all that, what we're talking  
11 about here, that the job of the Commission is just to  
12 come up with the folks they think are best qualified  
13 and available to fill it, and that endeavor language  
14 means that we want people, try to encourage them to  
15 serve, but really that's not the Commission -- that's  
16 not part of their job, to assure that those people will  
17 serve.

18                  MS. KLEINFELTER: I think that's  
19 correct, Your Honor. I think that's exactly what the  
20 Legislature intended --

21                  THE COURT: Why does that make sense  
22 under the policy? I mean if you read through this, it  
23 looks like the Commission is supposed to go out and  
24 survey and try to find the best-qualified people and  
25 tell the Governor, here are three best-qualified people

1 that we have found.

2 But it looks like, under D, that as far  
3 as agree to serve if appointed, that that's, I guess,  
4 what you would say they encourage that or they endeavor  
5 to find that, it's an aspiration, but it's not a  
6 requirement.

7 Is that how you read the statute? Is  
8 that --

9 MS. KLEINFELTER: Yes, Your Honor. I  
10 think that's exactly how you read the statute;  
11 otherwise, there would have been a requirement -- I  
12 mean the Legislature could have said that the  
13 Commission is to select three people who are -- that  
14 they deem to be the best qualified, and who have  
15 committed to serve, or have put some sort of language  
16 in there that made it a requirement that the people  
17 serve.

18 And, more importantly, over in 17-4-112,  
19 which is where the actual appointing authority is  
20 discussed, that it says that the Governor has to choose  
21 one of the three nominees, provided that all three  
22 nominees have agreed to serve or provided that all  
23 three nominees are available to serve or willing to  
24 serve. They could have made it a condition to it, but  
25 they didn't do that. They instead said they're

1 encouraged to try and find people.

2 I mean obviously there are probably  
3 hundreds of lawyers out there that are eminently  
4 qualified to serve on the Supreme Court but may not be  
5 willing to serve for all different reasons.

6 THE COURT: And so the wording "the  
7 condition precedent that the Commission has to fulfill  
8 before the Governor's rights are triggered" is that the  
9 Commission has to select three persons it deems best  
10 qualified and available to fill the vacancy, not  
11 persons who have agreed to serve if appointed?

12 MS. KLEINFELTER: Correct. And Your  
13 Honor, I would point out that it's undisputed in the  
14 record that at the time the Commission did that --  
15 there's no evidence in the record that at the time the  
16 Commission selected and certified the three names, of  
17 Chancellor Dinkins, Mr. Lewis, and Mr. Gordon, that any  
18 of these three were not available to serve. That only  
19 occurred post-certification or post-nomination.

20 And to suggest that, that a nominee can  
21 somehow, by their unilateral action, whether it's an  
22 intentional act, in this instance, or an unintentional  
23 act -- for example, I mean the one that keeps coming to  
24 mind for me is if they, you know, suddenly had a heart  
25 attack and died -- to say that that somehow destroys

1 the fact that they were nominated, and that three  
2 people were nominated by the Commission, the Commission  
3 did exactly everything that the statute says they're  
4 supposed to do, and that also destroys any opportunity  
5 for the other two nominees to even be considered for  
6 appointment.

7 THE COURT: So if we make certification  
8 the act by the Commission that fulfills the condition  
9 precedent and triggers the Governor's rights, it gives  
10 us some certainty with respect to how we apply this  
11 procedure, and it's consistent with the statute, and in  
12 this case it was fulfilled --

13 MS. KLEINFELTER: Correct, Your Honor.

14 THE COURT: -- later? Okay.

15 MS. KLEINFELTER: I mean it's entirely  
16 consistent with the statutory language.

17 I mean I can't think of a way to  
18 construe the statute to, to --

19 THE COURT: The second -- okay. The  
20 second question: You had said in your opening outline  
21 of this point -- you brought up two points; one  
22 concerned erasing historical effect, the certification  
23 by the Commission, but you also said that one  
24 individual can't unilaterally destroy the opportunity  
25 of the other individuals.

1                   If the Court were to agree with the  
2     intervenor that three nominees who have agreed to  
3     serve, if appointed, are required, then why couldn't  
4     the Court remedy what happened in this case by simply  
5     sending this matter back to the Commission to name a  
6     third nominee for that first panel, and that way their  
7     opportunity wouldn't be destroyed?

8                   MS. KLEINFELTER: Okay. In the first  
9     instance, Your Honor, historically, that is not what  
10    has occurred. And secondly, we don't see where there's  
11    the statutory authority for allowing the Commission  
12    to -- you know, the player to be named at a later date.  
13    I mean essentially that's what we're talking about  
14    here.

15                  THE COURT: Let's break that down.  
16    Historically that's not occurred; that's just -- I mean  
17    we don't have any precedent from that --

18                  MS. KLEINFELTER: Yes, Your Honor, there  
19    is precedent.

20                  THE COURT: No, there is precedent, but  
21    not from a Court.

22                  I mean we've had that happen. It  
23    happened with Judge Turnbull, I guess you're referring  
24    to. But no Court weighed into that and made a legal  
25    declaration about that.

1                   It occurred, we can draw inferences from  
2 that event, but I don't think there was a Court --

3                   MS. KLEINFELTER: No, there was no Court  
4 because, Your Honor, quite frankly, the Judicial  
5 Selection Commission did not take the position that  
6 they had the authority to send up a third nominee, to  
7 make -- I mean to make a fourth nominee. We're not  
8 talking about a third nominee; we're talking about a  
9 fourth nominee.

10                  THE COURT: Yes. So I can draw some  
11 conclusions from that, but there's no case precedent.

12                  MS. KLEINFELTER: Your Honor is entirely  
13 correct about that. There is no precedent from a  
14 Court, there is just the historical precedent, and the  
15 fact, of course, that the Commission has never taken  
16 that position, as well, and is not taking that position  
17 today.

18                  THE COURT: On the second point, the  
19 statute does allow the Commission to establish rules of  
20 procedure and bylaws, and they can change those from  
21 time to time.

22                  Why wouldn't it come within that power  
23 granted to the Commission for them to pass a rule in  
24 which they would say if one of the three nominees  
25 certified to the Governor withdraws, then it comes back



1 to the Commission for us to complete the panel?

2 MS. KLEINFELTER: Well, Your Honor,  
3 again, I would have to go back to the language of the  
4 statute.

5 When you look at -- I mean the only two  
6 statutes that discuss what authority, what power, is  
7 given to the Commission are found in 109 and in 112.

8 109 ends with subsection E, which says  
9 that they are to, by a majority vote, select those  
10 three nominees and certify those names to the Governor.  
11 And then 112(a) says that then the Governor -- the only  
12 reference to the Commission in 112(a) is if the  
13 Governor rejects, and if the Governor rejects, then he  
14 can require the Commission to send up that one other  
15 panel.

16 Yes, the fact that they're given the  
17 authority to establish rules and bylaws, that's rules  
18 and bylaws as to how they're going to govern  
19 themselves, operate themselves.

20 I don't think that they could enact a  
21 rule or a bylaw that gives them greater authority than  
22 what the Legislature has given to them in the statutes.

23 I mean they are a creature that was  
24 created by the Legislature, they only have what  
25 authority that the Legislature gives them, and the

1 Legislature didn't say that you can create a rule or a  
2 bylaw that gives you more authority than what you've  
3 got.

4                   And the statute, again, how you can read  
5 in there that they have the authority to say, well, if  
6 one withdraws after we've nominated -- after we've sent  
7 those three names up to the Governor, if somebody says  
8 I don't want to be considered, or for some reason is no  
9 longer available, we get to make that fourth nominee or  
10 that fifth nominee, if you've, by chance, had two of  
11 them withdraw or two become available.

12                   THE COURT: That answers the Court's  
13 questions on Governor Bredesen's response to this  
14 argument.

15                   Were there any other points that you  
16 wanted to mention to the Court about this? Have we  
17 covered it all or --

18                   MS. KLEINFELTER: I think we've covered  
19 it; between your questions and what we've put in our  
20 brief, we've covered that.

21                   THE COURT: All right.

22                   MS. KLEINFELTER: And I think that gets,  
23 then, to the second point, because our position is, is  
24 that we had a valid panel, there was a valid panel that  
25 was submitted to the Governor on July 18th for him to

1 act upon, to either appoint or reject, and in this  
2 instance the Governor rejected. And so that gets to  
3 the second preemptive defense that has been raised, and  
4 it's kind of divided into two parts. And the first one  
5 is -- or the first issue the Court has identified --  
6 is, is the ability -- the authority of the Commission  
7 to even review the legitimacy of that rejection, what  
8 authority does the Commission have to essentially  
9 second-guess the Governor's reasons for rejecting a  
10 panel.

11 As I just pointed out, Your Honor, the  
12 Judicial Selection Commission is a creature that was  
13 created by the Legislature, it didn't exist until the  
14 Tennessee Plan was adopted in 1994, and it only has  
15 those powers that are given to it by the Legislature as  
16 are set forth in the statute. And the sole function,  
17 as set out in the very first part of the Tennessee  
18 Plan, their function is to assist the Governor in  
19 finding and appointing the best-qualified persons  
20 available for service on Appellate Courts. And there's  
21 nothing in there that would suggest that the Commission  
22 has the power to review the Governor's reasons for  
23 rejecting a panel.

24 THE COURT: And you're talking about, I  
25 guess, 17-4-101, where it says -- no, I'm sorry,

1 that -- is that where it talks about the Commission  
2 assisting --

3 MS. KLEINFELTER: Yes, Your Honor.

4 THE COURT: Is that the statute you're  
5 relying on?

6 MS. KLEINFELTER: Yes, Your Honor.

7 THE COURT: All right.

8 MS. KLEINFELTER: I think, even more  
9 importantly, there's been a lot of discussion here that  
10 says that, well, the language in the statute is  
11 ambiguous and you can have a lot of different  
12 interpretations.

13 And, of course, one of the fundamental  
14 rules of statutory reconstruction is, okay, if the  
15 language is ambiguous -- and we submit that it's not,  
16 but if it is, okay -- then go look at the legislative  
17 history to see if there's anything in the legislative  
18 history that can help a Court in discerning what the  
19 Legislature's intent was.

20 And we've pointed out specifically in  
21 the legislative history that the General Assembly,  
22 debate among the General Assembly, that they clearly  
23 contemplated there were to be no limitations upon the  
24 Governor's right to reject other than -- and this is  
25 the quote -- that the safeguards in public opinion.

1                   Essentially, the Legislature decided  
2 we're not going to let the Commission or anybody else  
3 judge the reasons of the Governor's rejection except  
4 the court of public opinion.

5                   THE COURT: I read in your papers -- I  
6 think it was a discussion between -- was it Mr.  
7 Jordan --

8                   MS. KLEINFELTER: Senator Jordan --

9                   THE COURT: -- and Senator Wilder? I  
10 had a hard time following it. Could you point out for  
11 me the wording that is, I guess, is most on point?  
12 Because I was trying to extract that fact from the  
13 discussion, and really --

14                  MS. KLEINFELTER: Do you --

15                  THE COURT: -- having difficulty.

16                  MS. KLEINFELTER: -- want it from the  
17 actual transcripts or --

18                  THE COURT: I've got it -- you had  
19 attached it or quoted it in your papers. We can use  
20 that.

21                  Just point me out in your papers. I  
22 think it's on page -- what -- 15 or 16 maybe? Hang on  
23 here. Yes.

24                  MS. KLEINFELTER: Okay. Your Honor,  
25 this is within the context of -- this was actually the

1 Senate debate.

2                   This bill came up -- just to give you a  
3 little bit of the history, Senator Wilder was the  
4 sponsor of the bill. And the bill, as it was  
5 originally introduced by Senator Wilder, took out or  
6 gave no authority to the Governor to reject.

7                   The way it was set up was, is three  
8 nominees went up, and he had to pick one of those  
9 three, and that was it.

10                  Under the previous formulation of --  
11 under the old Missouri Plan, essentially, the Governor  
12 could reject and have them send up three more and could  
13 reject and have them send up three more and could  
14 reject until -- I mean as many times as he wanted to.  
15 There was no limitation on the number of times he could  
16 reject.

17                  During the Senate Judiciary Committee  
18 meetings, Senator Jordan introduced an amendment to the  
19 bill that would give that power back to the Governor.

20                  His bill actually sought to give him  
21 appointing powers in two places; one with respect to  
22 appointing members to the Judicial Selection  
23 Commission, which the Governor had had under the prior  
24 Act, as well as the power to reject a panel of nominees  
25 and ask that a second panel be sent up.

1                   He ended up, I think -- in negotiating,  
2 he ended up giving up and saying I'm going to -- you  
3 know, I'll give in on this power of the Governor to  
4 appoint to the Commission, I'll give in on that one,  
5 but I really think it's important that we have this  
6 check on the Executive branch -- I mean on the  
7 Executive branch and on the Judiciary branch -- set up  
8 in this system that we are devising for the appointment  
9 of judges under the Tennessee Plan.

10                   And that's where this conversation -- it  
11 was passed, the bill. The amendment was passed by the  
12 -- or was adopted by the Senate Judiciary. And then  
13 you had these discussions on the floor, the actual  
14 Senate debate.

15                   THE COURT: That context is very  
16 helpful, very helpful.

17                   Now, can you just point me to what do  
18 you think is most supportive of the point that you've  
19 made --

20                   MS. KLEINFELTER: Well, I think there's  
21 two points.

22                   I think you have the statements that  
23 were made, because it was -- Senator Person was the one  
24 who started out at the beginning of the discussion of  
25 the debates, to say that -- he was explaining what the

1 amendment was, and he said that -- because Senator  
2 Person, I believe, was the chairman of the Senate  
3 Judiciary Committee at that time -- and he was stating  
4 the Governor would have the right to reject the entire  
5 slate from the selection committee and ask for a new  
6 slate, and it doesn't appear to be any limitations on  
7 that.

8 That is Senator Person's introduction  
9 explanation of the amendment to the rest of the Senate  
10 as to what the purpose of the amendment was.

11 Then you have Senator Jordan, in  
12 response to questions, explaining why he thinks it's so  
13 important to have this, because we've set up a system  
14 of checks and balances and the check of the executive  
15 power on the Judiciary is the power of appointment.

16 And then you have Senator Wilder, who,  
17 as I pointed out, was the original sponsor of the bill,  
18 saying, look, I'm happy with this amendment, I don't  
19 think it does any harm to the bill, I'm okay with the  
20 amendment, approve the amendment, because I think there  
21 are sufficient safeguards in the public opinion. If --  
22 that's where the safeguards are, not in the Judicial  
23 Selection Commission or anybody else, but in the  
24 public.

25 If the Governor rejects and sends back a



1 panel, you know, the public -- it even says here if he  
2 sends it back for more than once, I think the public  
3 would turn against him.

4 That's the limitation. That is the  
5 review that the Legislature contemplated would occur,  
6 that any review of what the Governor does is going to  
7 be through the electorate, the qualified electorate,  
8 the voters. If they disagree, if they think that the  
9 Governor, his reasons were inappropriate --

10 THE COURT: So your point is that the  
11 legislative history supports the Governor's argument  
12 that the Commission is not the oversight body for his  
13 rejection and that they don't have that authority, it's  
14 not conferred by the statute?

15 MS. KLEINFELTER: Correct, Your Honor.  
16 And I think, again, it's supported by the plain  
17 language of the statute.

18 There's nothing in 17-4-112(a) -- which  
19 is where the language is found that authorizes the  
20 Governor to reject -- there's nothing in that statute  
21 that says, you know, that the Governor -- I mean what  
22 it says is that the Governor can either -- shall  
23 either, you know, fill the vacancy by appointing one of  
24 the three nominees or he may require the Commission to  
25 send up one other panel of three nominees.

1                   And it doesn't say or he may require the  
2 panel -- the Commission to send up one other panel of  
3 three nominees if they find his reasons for rejection  
4 to be legitimate or if they agree with his reasons for  
5 rejection.

6                   THE COURT: The wording apparently that  
7 the Commission and the intervenors emphasize is that in  
8 17-4-112, that second sentence, it says that the  
9 Governor shall state, in writing to the Judicial  
10 Selection Commission, the reasons for the rejection of  
11 the panel. And it says, shall state in writing, for  
12 the Commission, the reasons.

13                   Why would the Legislature require the  
14 Governor to state his reasons in writing and tell that  
15 to the Commission if they don't have some kind of  
16 oversight or they're not supposed to do something with  
17 that --

18                   MS. KLEINFELTER: I think, Your Honor,  
19 it's exactly what Lieutenant Governor Wilder said: By  
20 making the Governor state his reasons in writing,  
21 instead of just saying I reject, and giving no reasons,  
22 but giving his reasons in writing -- and he's got to  
23 give his reasons to somebody; logically it is to the  
24 Commission because it is to the Commission he is saying  
25 send me up another panel -- but by requiring him to put

1 his reasons in writing, that is the check, that is the  
2 safeguard, on the Governor's exercising his power --

3 THE COURT: In the sense that it  
4 publishes it --

5 MS. KLEINFELTER: It publishes it and  
6 makes it public to the electorate.

7 THE COURT: Okay. So the reason for it  
8 is to make it public, not to invest power in the  
9 Commission to judge and have oversight on whether his  
10 reason is legitimate or not.

11 MS. KLEINFELTER: Absolutely, Your  
12 Honor.

13 And again, I go back to the legislative  
14 history. There is that specific reference, that  
15 specific discussion by Lieutenant Governor Wilder,  
16 that's the intent.

17 There's nothing in the legislative  
18 history that even discusses or would suggest that the  
19 purpose of requiring him to put his reasons in writing,  
20 to state it publicly, was to allow the Commission,  
21 then, to second-guess his reasons and say, well, if we  
22 don't agree with them.

23 I mean, for example, let's say the  
24 Governor had said I reject these candidates because  
25 none of them have any judicial experience, and the

1 Commission said -- the Commission says, sorry, we don't  
2 agree with that, we're going to send up the exact same  
3 three.

4 THE COURT: Is it reasonable to conclude  
5 that what the Legislature may have had in mind by  
6 requiring him to put the reasons in writing is that it  
7 might assist the Commission in their selection of a  
8 second panel since it appears that the statute  
9 contemplates they're going to work together, they're  
10 going to share this task, with input from one to the  
11 other?

12 Is that another way that you could --

13 MS. KLEINFELTER: I think, Your Honor,  
14 absolutely that is a reasonable and logical  
15 interpretation to make of the statute, is that, in the  
16 first instance, it's to put that check on the Governor,  
17 by making him publish his reasons, and that it is to  
18 assist the Commission in coming up with that one other  
19 panel of three nominees, to provide them some guidance.

20 But it doesn't in any way confer upon  
21 them the authority to second-guess and either reject  
22 the Governor's reasons for rejection if they don't  
23 agree with them.

24 THE COURT: Putting aside for a moment  
25 that legal point, what's the purpose for the

1 Legislature requiring the Governor to state his reasons  
2 for rejection in writing, let me go to a little  
3 footnote here, and that's the argument that's made -- I  
4 think it's in the Commission's papers -- that Governor  
5 Bredesen, in his letter, instructed, directed,  
6 required, imposed his authority upon the Commission to  
7 do a certain task --

8 MS. KLEINFELTER: Right.

9 THE COURT: -- with respect to the  
10 second panel.

11 MS. KLEINFELTER: Right.

12 THE COURT: And I'd like to look at the  
13 text --

14 MS. KLEINFELTER: Of that letter?

15 THE COURT: -- of that letter. I  
16 believe it's attached --

17 MS. KLEINFELTER: Yes, Your Honor.

18 THE COURT: -- to your --

19 MS. KLEINFELTER: I think it's attached  
20 to the Complaint.

21 THE COURT: This is, I think, somewhat  
22 of a footnote argument, that's how I've analyzed it,  
23 but I want to make sure that that is a correct  
24 analysis.

25 Tell me what your response is to the

1 characterization, and then we'll get back to your main  
2 points.

3 MS. KLEINFELTER: Your Honor, I would  
4 think, again, that the letter, which is Exhibit C to  
5 our Complaint, speaks for itself, and what it says is,  
6 is I therefore request. It doesn't say I demand, I  
7 instruct, I require, I authoritatively enforce that the  
8 Commission send me a new panel of nominees that  
9 includes qualified minority candidates. It says I  
10 request that the Commission send me a new panel of  
11 nominees that includes qualified minority candidates.

12 Now, my understanding -- I always tell  
13 this to my children: When I request them to do  
14 something, I'm asking them, but there's no  
15 understanding that they have to do it. Now, when I  
16 tell them to do something, there is that understanding.  
17 So if I tell my daughter, will you please clean up your  
18 room, that is a request. If I tell my daughter, clean  
19 up your room, that is a demand.

20 And I think it's very clear here that  
21 the Governor was simply providing his reasons and  
22 requesting that they take those reasons into  
23 consideration when they send up another panel, but was  
24 in no way insisting, demanding, requiring -- however  
25 you want to -- what terminology you want to use -- but

1 was in no way attempting to dictate to the Commission  
2 additional qualifications other than what the statute  
3 requires, or attempting to dictate to the Commission  
4 how they had to make their selection.

5 THE COURT: So we have covered, at this  
6 point, 17-4-112, how it delegates the power to the  
7 Governor and what that consists of and why he is  
8 required to state his reasons for rejection in writing.

9 Anything else on that point before we go  
10 to -- I guess the next item would be the Tennessee  
11 Human Rights Act --

12 MS. KLEINFELTER: Right. The actual  
13 validity of his rejection, because they, of course,  
14 have all challenged -- I think in this instance both  
15 the Commission and Mr. Lewis and Mr. Gordon have  
16 challenged the validity of the rejection, asserting  
17 that it was based solely upon race. Of course, we  
18 would disagree with that characterization in the first  
19 instance.

20 But I think it's very important, Your  
21 Honor, here to initially note that -- I think it's very  
22 disingenuous on their parts to say that the Governor  
23 shouldn't be allowed to consider racial diversity when  
24 making appointments, which is exactly -- I mean that's  
25 what he wanted to do. That's what he says.

1                   But the Tennessee Plan itself  
2 specifically requires the Commission to consider  
3 diversity in selecting nominees. Now --

4                   THE COURT: Where is that provision? I  
5 studied the papers, and what the other side cited to is  
6 that the Commission itself is to be composed -- take  
7 into account diversity, and the composition of the  
8 Judicial Selection Commission is to be diverse.

9                   Where does it state in the statute that,  
10 in selecting nominees, the Commission is to consider  
11 diversity? Does it actually state that? I was trying  
12 to find that this morning.

13                   Let's see, there's a place that's cited  
14 in -- it's in the Commission's argument. I believe  
15 they cite to 42-1-401(a) -- no, I'm sorry. Let me find  
16 that.

17                   Okay. They say here, on page two of the  
18 Commission's papers, all right, 17-4-102(a) -- that's  
19 the composition of the Commission -- and then it talks  
20 about speakers are required to ensure that the  
21 Commission reflects the diversity of the State's  
22 population, 17-4-102(b)(23). And then they say each  
23 group submitting names are enjoined to make a conscious  
24 effort to select a body which reflects a diverse  
25 mixture with respect to race, 17-4-102(b)(3)(c), but I



1 didn't see any citation to the Commission being  
2 required to take into account diversity.

3 MS. KLEINFELTER: And Your Honor, I  
4 think I misspoke, and I don't think that's what our  
5 papers actually say.

6 I think I misspoke as to what our papers  
7 said --

8 THE COURT: Okay. I may have  
9 misunderstood.

10 MS. KLEINFELTER: Well, and I think  
11 what -- I think the argument is, is that implicit in  
12 this requirement that the Commission be diverse, that  
13 diversity be taken into account into the composition of  
14 the Commission, is that the work of the Commission  
15 reflect that diversity.

16 If that's such a concern of the  
17 Legislature -- and I think if you -- actually if you  
18 look at the legislative history, there was more  
19 discussion and more debate and more argument among the  
20 legislators about the composition of the Selection  
21 Commission and that there was a need for diversity. I  
22 mean at one point there was a proposal that there  
23 actually even be a quota system, I mean that the  
24 composition of the Commission had to be in direct  
25 proportion to the population of the State of Tennessee.

1                   THE COURT: Let me get a clarification  
2 of your argument.

3                   The Commission argues that the tool the  
4 statute uses for assuring diversity on the Courts is  
5 the composition of the Commission, that they are a  
6 diverse body, and that that, then, will result in  
7 decisions that reflect the diversity of the population  
8 of the State. And so that's the tool, just their  
9 composition.

10                  They say taking that assumption, then  
11 the Governor is not permitted to take that into  
12 account. And then they go on and make their legal  
13 arguments.

14                  Anything you want to say about that?  
15 Because you're saying it's just the policy of the Act  
16 that diversity be considered in these appointments.  
17 They don't go that far. So --

18                  MS. KLEINFELTER: No, I think Your Honor  
19 has grasped what our argument is. I think it clearly  
20 is the policy of the Legislature, the intent of the  
21 Legislature, that diversity is important. I mean,  
22 otherwise, why would they have made such a big deal  
23 about requiring the Commission itself to be diverse?

24                  And again, remember that the commissions  
25 are always to assist the Governor in finding those

1 qualified nominees.

2                   And again, to say that -- as Your Honor  
3 pointed out, we have sort of this role, this joint role  
4 between the Commission and the Governor, and to say  
5 that only one party to that joint role there can be  
6 considered diversity, that it stops with the Commission  
7 and can't go any further with the Governor, I think is  
8 contrary to what the Legislature intended, and I think  
9 it's contrary to the policy of the State of Tennessee,  
10 and it certainly is not reflective of the policy and  
11 the purposes of the State of Tennessee.

12                   So I think it's very -- we simply  
13 disagree.

14                   And I think it's not just the Commission  
15 that has made that argument; I think it's also Mr.  
16 Lewis and Mr. Gordon that are making that argument, as  
17 well.

18                   To get more specifically into their  
19 arguments with respect to Title VII and the Tennessee  
20 Human Rights Act, Your Honor, as we pointed out in our  
21 brief there, in the first instance you need to  
22 understand that -- I mean, I think it's very clear --  
23 that the relationship between the Governor and the  
24 justices on the Supreme Court is not that of the  
25 employer/employee in any traditional sense of those

1 terms. In fact, our Constitution makes it very clear  
2 that the justices of the Supreme Court are to be  
3 elected by the qualified voters of the State of  
4 Tennessee. And the role of the Governor here, in  
5 conjunction with the assistance of the Commission, is  
6 simply to make an appointment to temporarily fill a  
7 vacancy until an election can be had. And the only  
8 reason why you have that time period there is because,  
9 again, our Constitution dictates that elections for  
10 judicial officers can only be held in the biannual  
11 election, which is the August election every two years.

12 So, you know, unfortunately, we can't  
13 time the vacancies on the Supreme Court to occur so  
14 that you can have that -- you know, so that there is no  
15 need to fill the vacancies, we can just go ahead and  
16 have the election.

17 The Governor has no authority over the  
18 justices of the Supreme Court. Again, our Constitution  
19 makes it very clear that the justices are part of the  
20 Judicial branch, a separate branch of government, and  
21 the Governor has no authority -- he can't tell them  
22 what to do, he can't tell them what hours to work, he  
23 can't tell them -- he can't dictate anything to them.  
24 He can't even dictate what their compensation is going  
25 to be.

1                   THE COURT: Under the wording of the  
2 Tennessee Human Rights Act, is it dispositive of this  
3 argument that Governor Bredesen is not an employer or  
4 is there also a theory that the Commission and the  
5 intervenors can argue by saying that what the Governor  
6 did was discriminating against the intervenors with  
7 respect to conditions or privileges of employment?

8                   In other words, if I find he's not an  
9 employer, does that end the argument or do they have  
10 this second prong, this other tier, that they can argue  
11 under the Tennessee Human Rights Act, that in the  
12 capacity he's acting in, he is discriminating against  
13 them with respect to employment?

14                   And that's --

15                   MS. KLEINFELTER: Again, Your Honor,  
16 he's not employing them; it's the people of the State  
17 of Tennessee who ultimately employ the justices. I  
18 mean we've seen that the people of the State of  
19 Tennessee can vote in or vote out a judge.

20                   THE COURT: My question, I didn't state  
21 it very well; it's very technical: Under the express  
22 terms of the Tennessee Human Rights Act, is an  
23 employer, is that the necessary essential element that  
24 we have to have, or can it be expanded where someone is  
25 acting in a capacity of appointing someone or providing

1 a privilege of employment, so it's not just an employer  
2 but it's someone who is exercising according the  
3 privilege of employment?

4 Is that the other way they can go or  
5 not? Do you know?

6 I mean I can look that up. I meant to  
7 check it this morning and didn't have time, but --

8 MS. KLEINFELTER: Your Honor, we would  
9 submit that an employer -- and I think all their  
10 arguments have focused on the fact that -- have focused  
11 on that first argument, the employer argument, and have  
12 not attempted to make that secondary argument.

13 I'll have to confess this is not an area  
14 of my expertise, employment discrimination, but it  
15 would certainly seem to me, Your Honor, that if you're  
16 not an employer, then to argue that you're still  
17 offering privileges or consideration of employment, I'm  
18 not sure that you can make that jump.

19 We also have the other problem, and that  
20 is, is that -- and, of course, we've pointed out in our  
21 brief -- under Title VII, Title VII simply isn't  
22 applicable here because of the exclusion for  
23 policymakers.

24 Now, the purpose of a human rights act  
25 is, of course -- and the Legislature stated this very

1 clearly -- is to implement the policies of Title VII of  
2 the Federal Civil Rights Acts of 1964 and 1968 and  
3 1972, and the Pregnancy Amendment Act and the ADEA, and  
4 there are numerous Tennessee cases where the Tennessee  
5 courts have said that the Tennessee Human Rights Act is  
6 to be interpreted coextensively with Title VII, and  
7 that you should look to what the Federal courts have  
8 said when you're trying to interpret and apply the  
9 Tennessee Human Rights Act.

10                   And this exemption for high-level  
11 policymakers, which includes State court judges,  
12 there's not a Tennessee court that's ever spoken on  
13 that issue. That issue has just never arisen.

14                   But we would submit that, Your Honor,  
15 given the Tennessee courts have made it clear over and  
16 over and over again, and the legislators made it clear,  
17 that the whole purpose and intent of the Human Rights  
18 Acts, the THRA, is to implement the policies of the  
19 Federal Title VII, that it would be -- and that courts  
20 are to look at the interpretations given by the Federal  
21 courts, that it's necessarily implicit that the  
22 Tennessee Human Rights Act would afford this same  
23 protection that has been given under Title VII and to  
24 exclude those high-level policymakers.

25                   THE COURT: Do we have any examples in

1 other areas of the interplay between the Tennessee  
2 Human Rights Act and Title VII where the Tennessee Act  
3 has been construed to provide for something different,  
4 either because it's explicitly stated in the act or, as  
5 in this case, it doesn't contain a specific exemption?

6 Do we have any cases like that where we  
7 have deviated from the Federal interpretation --

8 MS. KLEINFELTER: Not that I'm aware of,  
9 Your Honor, but I will have to say that I have not done  
10 an exhaustive search of that.

11 I certainly did not see -- you know,  
12 obviously, looking in the annotations on the Tennessee  
13 Human Rights Act and in discussing it with the  
14 attorneys in our office who do deal with this much more  
15 extensively than I do -- certainly did not identify  
16 any situation in which the Tennessee courts have, under  
17 a case brought under the Human Rights Act, have  
18 deviated.

19 Quite frankly, Your Honor, what I was  
20 told and what is borne out by a lot of cases is that  
21 most people, if they're going to bring a claim of  
22 employment discrimination, they go ahead and bring it  
23 under the Federal Act, under Title VII, and more often  
24 than not, they bring it in Federal Court --

25 THE COURT: Well, early on, we had a lot



1 of cases under the Tennessee Human Rights Act, when  
2 they had that glitch about bring it up before the  
3 Commission or you could file it in court, and there was  
4 a question about whether you had to exhaust your  
5 administrative remedies, and some lawyers would use  
6 that strategically, and that made for a lot of cases,  
7 or more cases, under the Tennessee Act. But after that  
8 got cleared up, a lot of them did go back to Federal  
9 Court, but -- okay. So we don't -- that's a little bit  
10 of an open area.

11 Okay. What else on this point of Title  
12 VII and the interplay between the Tennessee Human  
13 Rights Act? Other arguments you want to present to the  
14 Court on that?

15 MS. KLEINFELTER: Your Honor, I think  
16 we've addressed them fully in our brief; simply that  
17 Title VII, Congress has adopted that expressed policy  
18 there that these high-level policymakers should be  
19 excluded, and given that our Legislature has adopted,  
20 you know, a purpose for the Tennessee Human Rights Act  
21 to embody those same policies, that that same  
22 protection should be afforded in interpreting the Human  
23 Rights Act with respect to high-level policymakers  
24 additionally.

25 THE COURT: And you're just not sure how

1 narrowly or expansively the term "employer" has been  
2 construed in the case law?

3 We've got that Richardson case you-all  
4 cited to, but other than that, there's --

5 MS. KLEINFELTER: Well, and that -- Your  
6 Honor, to some extent, that kind of leads into the  
7 argument that -- the only argument that -- I mean the  
8 argument that was raised -- and I think it's only been  
9 raised by Mr. Gordon with respect to his equal  
10 protection argument -- and that's where the Supreme  
11 Court has, in cases, recognized that there is a  
12 distinction between your run-of-the-mill, your general  
13 employment discrimination cases, cases where the  
14 governmental function involved, or the governmental  
15 action involved, is devoid of any kind of political or  
16 policy-making content.

17 They've recognized that that is  
18 different from what we have here, which is the exercise  
19 of a discretionary power that's been allocated to, in  
20 this instance, the chief elected official of the State  
21 of Tennessee, with substantial policy-making  
22 importance.

23 The case that we cited is actually a  
24 case that dealt with the Mayor of the City of  
25 Philadelphia, who is even, you know, on a lesser level

1     than the Governor. I mean the Governor is the chief  
2     executive officer of the State of Tennessee.

3                     But in any event, the Supreme Court  
4     recognized there's a distinction between these two.  
5     And we don't have your general, run-of-the-mill  
6     employment case. They didn't characterize it as an  
7     employment case.

8                     And they said that, in that instance,  
9     that allowing a Federal Court, particularly a Federal  
10    Court -- but I think the same concerns are present with  
11    the State Court -- but allowing the Federal Court to  
12    dictate to a Governor, to order a Governor, to exercise  
13    his discretion in a particular way, raises issues of  
14    Federalism concerns as well as separation of powers,  
15    those type of issues.

16                    Now, unfortunately, the Supreme Court  
17    didn't reach the issue because they found in those  
18    instances that they could -- essentially they found  
19    that there wasn't enough evidence of racial  
20    discrimination involved. But I think it's very  
21    instructive as to what the Court has said, the Supreme  
22    Court has said, and has recognized that there's a  
23    difference between just your regular employer and the  
24    employment discrimination cases and what we clearly  
25    have here, and that is the Governor exercising his

1 discretion, using his -- exercising his opinions,  
2 applying his opinions as to what he thinks is important  
3 and exercising authority that was given to him by the  
4 Legislature.

5                   And we would point out, Your Honor, that  
6 there is the one case that we cited, the case that  
7 dealt with the Indiana Plan for selecting members of  
8 their Judicial Nominating Commission and for selecting  
9 judges to fill vacancies.

10                   It's not quite exactly like ours, it's  
11 actually a little bit more complicated than ours, but  
12 it's similar in that there is a nominating commission  
13 that is created where the members are appointed, and  
14 they then select nominees from which the appointing  
15 authority appoints a judge to fill a vacancy until an  
16 election can be held, and then the judge runs under a  
17 retention election.

18                   And Your Honor, in that case, the -- the  
19 plaintiffs in that case were -- unlike the intervenors  
20 in this case, the plaintiffs in that case were actually  
21 minorities, and their argument was that the method of  
22 not only selecting the members of the Judicial  
23 Nominating Commission but the method of selecting the  
24 judges is discriminatory, it violates our rights under  
25 the Voting Rights Act as well as under the Equal

1 Protection clause, and as well as our -- their rights  
2 under the 15th Amendment, their voting rights under the  
3 15th Amendment.

4 And the Court went through -- and  
5 there's a very -- it's a very good discussion, a very  
6 good analysis -- and the Court made a distinction  
7 between elections, appointment -- I mean the filling of  
8 selections of state officials by election and the  
9 selection of officials -- in this instance, on a  
10 temporary basis, by appointment -- and specifically  
11 said, you know, when you've got that selection by  
12 appointment, by executive appointment, it doesn't  
13 implicate the Equal Protection clause.

14 And that's exactly the same thing we  
15 have here, Your Honor. It's not -- when the Governor  
16 is exercising his authority and making that executive  
17 appointment, it's not an election, it's a selection by  
18 appointment, and it should not implicate the Equal  
19 Protection clause.

20 In any event, Your Honor, the importance  
21 and the sincerity of the Governor's stated reasons  
22 here, his absolutely-stated reason, his desire to have  
23 diversity as one of the several factors to be  
24 considered, is something that the Court, the Supreme  
25 Court, again has said should be considered, that

1 they're not reasons that were based upon any kind of  
2 belief that a minority judge is going to rule the same  
3 way or going to express some characteristic minority  
4 viewpoint, which is something that the Court has been  
5 very concerned about in Equal Protection cases.  
6 Rather, his reasons were based upon, I think, two  
7 things; one is the recognition that the Supreme Court  
8 has historically only had two racial minority members,  
9 one of which only served for about a month or so. It's  
10 also -- and this is clearly expressed in his letter --  
11 it's based upon a recognition that for the past 13  
12 years the State had been well served by a Supreme Court  
13 that did reflect the diversity of Tennessee, and  
14 therefore, in his opinion, diversity was a significant  
15 factor that should be considered. And that's  
16 particularly so because, I mean, as I said, it reflects  
17 the diversity of the State, and all members of the  
18 State of Tennessee, all citizens, should have  
19 confidence in the openness and integrity of our court  
20 system.

21                   And these are all reasons, these are all  
22 policies, these are all purposes that the Supreme Court  
23 has recognized are valid.

24                   And the other thing we would point out,  
25 Your Honor, I think Mr. Lewis has made the argument

1 that, well, okay, even if you make all this, the  
2 rejection is not narrowly tailored.

3 The problem with that argument, Your  
4 Honor, is, is that that's the only option that was  
5 available to the Governor under the Tennessee Plan.

6 If he wanted to have diversity to be a  
7 factor to be considered, and that was not present,  
8 that's the only option available to him.

9 He didn't say I'm only going to appoint  
10 a racial minority to the bench. He didn't say I'm not  
11 going to appoint any white applicants. What he said  
12 was, is that I think diversity, in light of the history  
13 of how the State has been served for the past 13 years,  
14 I think diversity is very important and I think it's a  
15 factor that I should have to consider among all the  
16 other factors.

17 The only option available to him, under  
18 the Plan, is to reject.

19 THE COURT: Your argument has raised  
20 several questions.

21 MS. KLEINFELTER: I figured it would.

22 THE COURT: First of all, should the  
23 Court assume, on the summary judgment, assume that race  
24 was a motivating factor in the Governor's rejection?

25 And I'm headed -- where I'm headed with

1 that is I'm going to get into some of the arguments  
2 that Mr. Bone has raised about genuine issues of  
3 material fact.

4 But let's just start. This is summary  
5 judgment. You have some legal arguments on this point.  
6 In assessing those legal arguments, should I assume  
7 that race was a motivating factor in the Governor's  
8 rejection; can I characterize Exhibit C that way? And  
9 I'm careful to say motivating factor as opposed to  
10 exclusive or sole basis.

11 MS. KLEINFELTER: Yes, I mean I think  
12 the lack of diversity presented to the Governor upon  
13 Chancellor Dinkins' request that he no longer be  
14 considered was a motivating factor.

15 THE COURT: So you're more comfortable,  
16 of course, with stating it the lack of diversity, but  
17 it was a motivating factor in the rejection? We can  
18 assume that in assessing the legal arguments?

19 MS. KLEINFELTER: I think you have to,  
20 Your Honor.

21 THE COURT: Okay. Now, if we assume  
22 that, it sounded like to me -- and I want to make sure  
23 I understand this point, and then we'll go back about  
24 genuine issues of material fact -- but let me -- it  
25 sounded like, from your argument, that in determining



1 whether race is a permissible basis for rejection, that  
2 there may be some ways that it can be and some ways  
3 that it can't, and what you argued is that the things  
4 articulated by the Governor are a permissible --

5 MS. KLEINFELTER: In fact, --

6 THE COURT: -- consideration --

7 MS. KLEINFELTER: Your Honor, in fact,  
8 that is the case, but the Supreme Court, back in 1987,  
9 in the case of Johnson versus Transportation Agency --  
10 and the cite is 48-0-616 -- they essentially recognized  
11 a -- what I would call a safe harbor exception to Title  
12 VII, that allows diversity to be taken into account in  
13 the employment context.

14 Now, again, our position is Title VII  
15 doesn't apply at all, but in the employment context, it  
16 says you can take diversity into account if there is,  
17 number one, a manifest imbalance that reflects  
18 underrepresentation of minority groups, and two, that  
19 the employment practice under consideration meets a  
20 six-factor test. And the very first factor of that  
21 test is, is that it must be remedial.

22 And that's clearly what the Governor  
23 intended here. Now, if --

24 THE COURT: Are we headed into the  
25 waters of genuine issues of material fact?

1 MS. KLEINFELTER: No, Your Honor,  
2 because the argument is, is that if the -- if the  
3 United States Supreme Court, in 1987 -- fully aware of  
4 all the Equal Protection cases out there and what the  
5 Equal Protection clause provides -- if they found,  
6 under Title VII, that there is a Safe Harbor exception,  
7 where diversity is allowed and can be considered, then  
8 how could you, at the same time, say that that  
9 exception would violate the Equal Protection clause.

10 THE COURT: And what Mr. Bone hints at  
11 in his papers is, Judge, you can't answer that question  
12 on this record, we need discovery, Governor Bredesen's  
13 letter is oblique, it doesn't provide us with the  
14 evidence that we need on that.

15 MS. KLEINFELTER: And I don't understand  
16 what evidence he needs because, again, the statute  
17 simply says that the Governor has to provide his  
18 reasons. Mr. Bone's argument is, is that those reasons  
19 necessarily have to relate to the qualifications of the  
20 nominees and can't be any other reason; it can't be  
21 because the Governor -- for whatever reason other than  
22 has to be toward their qualifications.

23 But Your Honor, the problem with that  
24 argument is, is that the statute sets out what the  
25 qualifications are.

1                   The statute, the Tennessee Plan itself,  
2                   says that in order to even be a nominee, in order for  
3                   the Commission to even nominate you, you have to meet  
4                   certain qualifications.

5                   Now, if -- if you have to meet those  
6                   qualifications to even be a nominee, and the Commission  
7                   finds that you meet those qualifications and makes you  
8                   a nominee, how can the Governor, then, ever reject, if,  
9                   under Mr. Bone's argument, the rejection has to be  
10                  related to the qualifications of the nominee?

11                  I mean it's kind of a circular argument,  
12                  and it binds the Governor, and basically says, well,  
13                  yes, I know the statute gives you the authority to  
14                  reject, but you really can't because it has to be  
15                  related to qualifications, and the statute sets the  
16                  qualifications in order to be a nominee in the first  
17                  place.

18                  THE COURT: Anything else on this  
19                  argument?

20                  MS. KLEINFELTER: Your Honor, again, I  
21                  think, for the most part, our briefs have covered this,  
22                  I mean unless the Court has other questions.

23                  THE COURT: Is this the final point of  
24                  your argument in chief or are there other points you  
25                  want to raise? Because --

1 MS. KLEINFELTER: Well, there --

2 THE COURT: -- I do have a question  
3 that --

4 MS. KLEINFELTER: Well, there is -- I  
5 mean we, of course, have not addressed the argument  
6 itself with respect to the issue that the Governor  
7 presented in his Complaint. But that -- I guess that  
8 is with respect to the preemptive defenses, those  
9 issues that the Court identified as being preemptive  
10 defenses.

11 I'm prepared to move on to the  
12 Governor's issue unless the Court has other questions.

13 THE COURT: I want to thank you for  
14 answering my questions.

15 Those are all I have on the preemptive  
16 defenses, and I appreciate very much your argument. It  
17 was very helpful.

18 MS. KLEINFELTER: Certainly.

19 THE COURT: Okay. The statutory  
20 construction issue, the word "other" in 17-4-112.

21 MS. KLEINFELTER: Right. And, Your  
22 Honor, again, I think we have -- we've pretty  
23 thoroughly briefed this in our original motion for  
24 summary judgment.

25 We've pointed out and provided to the

1 Court significant legislative history that supports our  
2 interpretation.

3 I would note that it would appear that  
4 the Commission and Mr. Lewis, at least based upon their  
5 motions for summary judgment, appear to have conceded  
6 this issue, or certainly have not addressed it in their  
7 motions, and that it's only Mr. Gordon who is still  
8 challenging the interpretation, the construction of the  
9 statute, which the Governor believes is the  
10 interpretation that is -- the only interpretation  
11 that's supported by both the language and the  
12 legislative history of the Act.

13 And Your Honor, I don't know how much  
14 detail you would like me to go into because, like I  
15 said, we've been pretty exhaustive in our original  
16 brief, and while I know you gave me two and a half  
17 hours, I don't think I could talk for two and a half  
18 hours. I don't think if I sat up here and read  
19 everything, it would take two and a half hours.

20 THE COURT: I'm assuming you wanted to  
21 reserve some of that time for a reply; is that correct?

22 MS. KLEINFELTER: Yes, that would be  
23 fine.

24 THE COURT: Okay. That was my thought.  
25 Then let me ask you --

1 MS. KLEINFELTER: Yes, I think --

2 THE COURT: -- a question --

3 MS. KLEINFELTER: -- if you had  
4 questions about --

5 THE COURT: I do.

6 MS. KLEINFELTER: -- our arguments, that  
7 would probably be --

8 THE COURT: I do. This pertains to the  
9 statutory construction issue. If the Court were to  
10 determine that the preemptive defenses are without  
11 merit, if the Court were to adopt your construction of  
12 17-4-112, that it requires the second panel to have  
13 persons different from the first, then, in this case,  
14 what is the remedy?

15 Does the Court send it back to the  
16 Commission and instruct them to select a third nominee  
17 to complete the second panel or is there another remedy  
18 alternative, and what should guide the Court in  
19 fashioning a remedy under your case, your theory?

20 MS. KLEINFELTER: Well, I think, Your  
21 Honor, that the remedy would be to send it back to the  
22 Commission, to instruct them to select a panel that  
23 doesn't comprise -- or doesn't contain any -- doesn't  
24 contain the names of Mr. Lewis or Mr. Gordon because  
25 they were on the first panel.

1 THE COURT: You have anticipated where  
2 I'm headed with this, and --

3 MS. KLEINFELTER: With respect --

4 THE COURT: -- the question is does the  
5 second panel -- under your theory of the case, if you  
6 prevail on it -- does the second panel stand, except  
7 Mr. Gordon is removed and they provide a third nominee,  
8 or is it sent back to them to start over on a second  
9 panel?

10 What are the implications, both legal  
11 and policywise?

12 MS. KLEINFELTER: I think, Your Honor,  
13 the only way it can be construed is that the Commission  
14 would need to start over.

15 Now, obviously, that has some  
16 ramifications for the two individuals who are on the  
17 second --

18 THE COURT: Put that aside.

19 MS. KLEINFELTER: -- panel.

20 THE COURT: Why do you say that that is  
21 clearly what --

22 MS. KLEINFELTER: Well --

23 THE COURT: What authority is it -- are  
24 you saying that's based on? Policy, statute, fairness?  
25 What --

1 MS. KLEINFELTER: Well, I guess, to me,  
2 the only logical result is, is that the second panel --  
3 we've never had a second panel that's been submitted  
4 to -- I mean if -- if the Court finds that the  
5 Governor's interpretation of 17-4-112(a) is correct,  
6 then, to me, the next logical step is a determination  
7 that we've never had a valid second panel that has been  
8 certified by the Commission, and if we haven't had that  
9 second panel, that one other panel, a valid one other  
10 panel of three nominees, then the process should --  
11 we're essentially back to that point -- we're back to  
12 the point of rejection.

13 THE COURT: I want to talk about some of  
14 the legal and policy implications of this.

15 We're now three months into a Supreme  
16 Court vacancy. We've had numerous people apply,  
17 they've had to submit many papers, it's taken up a  
18 great deal of time of the State, all of those  
19 considerations -- which, of course, are recognized by  
20 your side because you asked for a speedy resolution of  
21 this issue -- would indicate that the remedy of  
22 starting all over again is not a good one, but  
23 narrowing it, tailoring it to address the problem or  
24 the invalidity of the one nominee.

25 Now, what's the --



1 MS. KLEINFELTER: Clearly, Your Honor,  
2 that remedy is a more narrowly tailored remedy and  
3 would presumably speed the process up.

4 THE COURT: And perhaps it would also  
5 instill more confidence in the system to do it that  
6 way, or not?

7 This is a public matter. Confidence is  
8 important in this proceeding. And any thoughts about  
9 that?

10 MS. KLEINFELTER: Your Honor, I have to  
11 confess I...

12 THE COURT: It's a hard question.

13 MS. KLEINFELTER: It's a very hard  
14 question, and if I can, for just a moment, confer with  
15 my boss --

16 THE COURT: Sure, absolutely. I think  
17 that's a very wise --

18 MS. KLEINFELTER: I'm just a foot  
19 soldier in the trenches.

20 THE COURT: Let's see what the Colonel  
21 says. Okay.

22 MS. KLEINFELTER: In this instance, the  
23 General.

24 THE COURT: Okay.

25 MS. KLEINFELTER: Your Honor, in the

1 interest of getting this moving along, can we take a  
2 little bit of time to think about it --

3 THE COURT: Sure.

4 MS. KLEINFELTER: -- and address that  
5 question in rebuttal?

6 THE COURT: Discretion is the better  
7 part of valor, and so, yes, that is fine. If would you  
8 think about that, talk about it, because I am  
9 interested in --

10 MS. KLEINFELTER: And there are  
11 competing considerations, and I think we just need a  
12 little bit of time to think about that.

13 THE COURT: We have covered a lot of  
14 ground. I appreciate your organization and how you've  
15 mastered the material. It has been very helpful to the  
16 Court.

17 Are you ready for me to hear from the  
18 other side, or any closing thoughts you have?

19 MS. KLEINFELTER: I think I'll save that  
20 for rebuttal, Your Honor.

21 THE COURT: Okay. Thank you very much.

22 MR. HICKS: Morning again, Your Honor.  
23 I'm John Hicks. I represent Mr. Lewis, and I'm pleased  
24 and honored to have been asked to represent Mr. Lewis  
25 in this case. It's a unique case, and his position in

1 this case is comparatively restrictive in that Mr.  
2 Lewis, because his rejection by the plaintiff was based  
3 solely on race, the Court should declare the rejection  
4 was invalid and direct the plaintiff to select from the  
5 remainder of the July 18th panel.

6 Mr. Lewis' position is likewise unique  
7 in that he hasn't taken a position on the procedural  
8 questions that Your Honor was addressing with General  
9 Kleinfelter earlier, and his position is narrow, that  
10 if Your Honor agrees with the position of Mr. Lewis,  
11 the Court has to hold that the rejection of Mr. Lewis  
12 and Mr. Gordon was invalid.

13 THE COURT: Right.

14 MR. HICKS: Mr. Lewis' position is that  
15 the plaintiff's rejection was invalid for two essential  
16 reasons: One, that it violated the Equal Protection  
17 clause of the United States Constitution; and two, the  
18 statutory, and primarily the Tennessee Human Rights  
19 Act, that Your Honor discussed with General Kleinfelter  
20 earlier.

21 The plaintiff, Your Honor, has to  
22 prevail on both of those issues in order to prevail in  
23 this case.

24 Mr. Lewis' position in this case is  
25 likewise unique, Your Honor, because what Mr. Lewis

1 seeks in this case is a vindication of his individual  
2 rights under the Equal Protection Act.

3                   The United States Supreme Court and  
4 numerous of the Circuit Courts and other courts have  
5 uniformly held that the right to equal protection is an  
6 individual right.

7                   And the cases that we rely upon most  
8 heavily, Bakke, Grutter, and Gratz, re-emphasize, Your  
9 Honor, that indeed they are individual rights.

10                   In this case, Your Honor, there can be  
11 no real issue. There's no real question that the  
12 reason that Mr. Lewis and Mr. Gordon were rejected --  
13 and the plaintiff's consideration of the first panel --  
14 was because of their race.

15                   Exhibit C can really have no other  
16 interpretation.

17                   The plaintiff stated his desire that  
18 diversity be an issue -- or be a consideration.  
19 Clearly, Mr. Lewis and Mr. Gordon are Caucasian. And  
20 the only thing in the record before this Court is that  
21 the reason for their rejection was because of their  
22 ethnicity.

23                   Like the reservation of 16 seats in the  
24 med school class, in Bakke, for minorities, from which  
25 majority applicants were excluded, Mr. Lewis was

1 excluded from any opportunity to compete for the  
2 position at issue in the case because he's Caucasian.

3 The timing and the sequence of events  
4 leads us to the inescapable conclusion, Your Honor,  
5 that he was never given serious consideration for the  
6 post because of his ethnicity. He was never  
7 interviewed.

8 And indeed, as I said earlier, the  
9 plaintiff indicated on two occasions, both in his  
10 letter to the Commission and in the August letter to  
11 the Commission, that the reason for the rejection of  
12 Mr. Lewis and Mr. Gordon was their ethnicity.

13 Because the exclusion of Messrs. Lewis  
14 and Gordon was based on their race, the Court has to  
15 examine the exclusion using strict scrutiny.

16 Justice O'Connor, in the Grutter case --  
17 and I'll read a brief quote -- indicated that absent  
18 searching judicial inquiry into the justification for  
19 such race-based measures, we have no way to determine  
20 what classifications are benign or remedial and what  
21 classifications are, in fact, motivated by illegitimate  
22 notions of racial inferiority or simple racial  
23 politics.

24 To pass Your Honor's strict scrutiny of  
25 the classification here, the plaintiff has to show the

1 Court that there is a compelling State interest, that  
2 the actions were necessary to satisfy a compelling  
3 State interest, and that they were narrowly tailored to  
4 meet the compelling goal.

5 May it please the Court, the record does  
6 not show --

7 THE COURT: Let me ask you a question of  
8 clarification about the law.

9 I discussed with General Kleinfelter  
10 that there are these circumstances that have been  
11 identified by the United States Supreme Court for under  
12 Title VII; there is an exemption for this kind of  
13 activity that we have, an appointment.

14 Is there any exemption, so to speak,  
15 that has been identified with respect to Equal  
16 Protection that we don't even get -- or go down that  
17 road because --

18 MR. HICKS: No, your Honor --

19 THE COURT: -- appointment?

20 MR. HICKS: There really is no such  
21 exemption. The Equal Protection clause trumps Title  
22 VII; it has to. And --

23 THE COURT: So it would trump, even, the  
24 theory that's been stated by the Governor that this is  
25 an appointment, it's not employment, it's a temporary

1 appointment?

2 All of those considerations, you say the  
3 Equal Protection clause trumps that?

4 MR. HICKS: I would say that it does.  
5 And indeed the --

6 THE COURT: Based on what authority?

7 MR. HICKS: Indeed, the practical  
8 effect, in this case, of the Tennessee plan is that,  
9 despite the fact that the Attorney General argues that  
10 this is -- there is an elected position at issue  
11 here -- the operation of the Tennessee plan effectively  
12 precludes Mr. Lewis' election until an applicant has  
13 been appointed, and then voted up or down, at which  
14 point, perhaps, he has the opportunity to run, but in  
15 this case, I think it is different because of that  
16 consideration, and that indeed the Equal Protection  
17 clause applies here --

18 THE COURT: Let me probe that a little  
19 bit.

20 You're saying it's remote -- his  
21 opportunity to be elected, for the public to express an  
22 opinion on the Governor's rejection, it's so remote --

23 MR. HICKS: Yes, Your Honor.

24 THE COURT: -- that that should be taken  
25 into account in determining whether the Equal

1 Protection clause in this case should be applied? Is  
2 that --

3 MR. HICKS: That is --

4 THE COURT: -- part of it?

5 MR. HICKS: That is essentially the  
6 argument here, Your Honor, that the Equal Protection  
7 Act -- the Equal Protection clause, when you consider  
8 it in conjunction with the practicalities of what's  
9 involved here, should apply to the Governor's  
10 appointment of candidates for the Tennessee Supreme  
11 Court.

12 THE COURT: Because Mr. Lewis'  
13 opportunities of obtaining this post in another way are  
14 remote --

15 MR. HICKS: Extraordinarily remote, Your  
16 Honor, again, absent another appointment, a subsequent  
17 up/down election and the opportunity to run in a  
18 general election.

19 THE COURT: Okay.

20 MR. HICKS: Your Honor, however laudable  
21 we may all agree that diversity on the Supreme Court  
22 may be, this record simply does not reflect evidentiary  
23 support to elevate that aspiration to a compelling  
24 State interest.

25 THE COURT: And when you say that, are



1 you, in fact, saying there are genuine issues of  
2 material fact or are you saying that what's undisputed  
3 indicates that we have an Equal Protection violation?

4 MR. HICKS: What is undisputed is that  
5 there is an Equal Protection violation, and there is no  
6 proof in the record that would support the Court's  
7 finding of a compelling State interest.

8 THE COURT: Okay.

9 MR. HICKS: There hasn't been anything  
10 developed in this record, and nothing asserted, that  
11 would support the Court's conclusion that there's a  
12 compelling State interest here.

13 Indeed, the idea of a compelling State  
14 interest here is belied by the fact that Chancellor  
15 Dinkins was on a panel that was sent up earlier and not  
16 appointed.

17 Secondly, Your Honor, to satisfy the  
18 Court's strict scrutiny here, the Court must find not  
19 only that there's a compelling State interest but that  
20 the remedy for the wrong or the -- that the actions  
21 taken were necessary or that they were likely to  
22 satisfy the compelling interest. In this case, they  
23 are neither.

24 The Court also has to find that the  
25 remedy or the action was narrowly tailored.

1                   And in this case, Mr. Lewis was rejected  
2 completely and solely, based on this record, based on  
3 his ethnicity.

4                   It is not a situation that the Supreme  
5 Court cases that we discussed earlier, Grutter and  
6 Gratz, addressed, where there were some considerations  
7 built into the process.

8                   Indeed, the law school case, the  
9 Bollinger case, reflected in -- the University of  
10 Michigan Law School applications -- resulted really in  
11 a fragmented court that affirmed those considerations,  
12 but we don't have anything in this case that remotely  
13 approaches the protections that were offered to the law  
14 school applicants here. Indeed, we have a blanket  
15 rejection based on race.

16                   So it is virtually impossible for the  
17 Court to find that the action here was narrowly  
18 tailored because Mr. Lewis was never considered, based  
19 on this record, on any basis other than race.

20                   For those reasons, Your Honor, I would  
21 submit, on behalf of Mr. Lewis, that, based on the  
22 Equal Protection clause of the United States  
23 Constitution, that the rejection of the July 18th panel  
24 must be invalidated.

25                   In addition to the Constitutional

1 arguments, Your Honor -- and Your Honor discussed this  
2 with General Kleinfelter at length -- is the  
3 application of the Tennessee Human Rights Act.

4 Your Honor, the thrust of General  
5 Kleinfelter's argument was that Your Honor should use  
6 the Federal interpretations of Title VII in Your  
7 Honor's interpretation of the Tennessee Human Rights  
8 Act.

9 What is rather remarkable about the  
10 Attorney General's argument here, however, is that they  
11 are asking Your Honor to write in the exception in  
12 Title VII for policy-making officials, when the General  
13 Assembly, faced with the existing language of Title  
14 VII, didn't choose to do so when they enacted the  
15 Tennessee Human Rights Act.

16 The simple -- Your Honor, the basic,  
17 straightforward statutory interpretation of the plain  
18 language of the statute must lead the Court to conclude  
19 that there is no policy-making exception similar to the  
20 one found in Title VII found in the Tennessee Human  
21 Rights Act.

22 If Your Honor please, Your Honor  
23 addressed the quotation in the Tennessee Human Rights  
24 Act earlier, in General Kleinfelter's argument,  
25 relating to the privileges of employment in that

1 language.

2 I would submit that we go even farther  
3 than looking to that language and conclude that here  
4 the State is indeed the employer. There really is no  
5 question that the State the employer.

6 The Supreme Court Justice is paid by the  
7 State, covered by the State's medical coverage,  
8 supervises State employees. Clearly the State is the  
9 employer in this instance.

10 And under the THRA, the provisions of  
11 the THRA are specifically defined to include the State.

12 For those reasons, Your Honor, in  
13 addition to the Constitutional arguments, we would  
14 submit that the Governor's rejection of the panel here,  
15 the July 18th panel, was a clear Constitutional and a  
16 clear statutory violation that is not justified.

17 We would submit to the Court that the  
18 appropriate remedy here is for the Court to direct that  
19 the Governor consider the panel constituted of Mr.  
20 Gordon and Mr. Lewis for appointment.

21 THE COURT: Let me put aside for a  
22 moment the remedy, because that was going to be my last  
23 question to you, as it was to General Kleinfelter, and  
24 ask --

25 MR. HICKS: Okay.

1                   THE COURT:  -- you a legal question.  
2   And then I'll put it in the context of Exhibit C,  
3   Governor Bredesen's letter.

4                   Is an essential element of a violation  
5   of the Tennessee Human Rights Act that race be the  
6   exclusive or sole factor in the decision?

7                   MR. HICKS:  No, Your Honor, it is not,  
8   particularly when Your Honor looks at the language  
9   quoted in our brief, in subpart two, that prohibits  
10  limitation, segregation, classification of an employee  
11  or applicants for employment in any way which would  
12  deprive or tend to deprive an individual of employment  
13  opportunities, otherwise adversely -- or otherwise  
14  adversely affect the status of an employee because of  
15  race, creed, color, religion, sex, age.

16                   There's no requirement that -- there  
17  really is no requirement that race be the exclusive  
18  factor, but in this case, based on this record, it is  
19  the exclusive factor that caused Mr. Lewis to be  
20  excluded from consideration.

21                   THE COURT:  Let me break that down.  
22  Does it have to be the exclusive factor under the  
23  wording of the statute, under the law?  Let's take that  
24  point.

25                   If you look at Governor Bredesen's

1 letter, he said that diversity is a significant factor.  
2 And then he says with Chancellor Dinkins' withdrawal he  
3 can no longer have the opportunity to consider that  
4 factor. We know that the Commission had already gone  
5 through the qualifications of these nominees and that  
6 they had met a standard, so we had persons that were in  
7 a level, a certain high level, and they had met  
8 standards. He doesn't say it's the exclusive factor,  
9 but he says it's a significant factor.

10 Take his wording and that, the face of  
11 the letter, and filter it through the law that you've  
12 just told to me that the Tennessee Human Rights Act  
13 sets up.

14 MR. HICKS: Your Honor, let me say this  
15 in the beginning: That as to Mr. Lewis, it's the only  
16 factor.

17 THE COURT: Why do you say that? Just  
18 because --

19 MR. HICKS: Because there is no -- there  
20 is no other factor stated by the Governor in any way  
21 that indicates the reasons for his rejection of Mr.  
22 Lewis.

23 THE COURT: All right.

24 MR. HICKS: There's nothing anywhere  
25 else in this record --

1                   THE COURT: You made that point in the  
2 introduction, in your introductory remarks.

3                   I don't think I appreciated it fully  
4 until we put it in this context of the law.

5                   So that's your answer?

6                   MR. HICKS: It is, Your Honor, it is;  
7 that nothing in this record indicates any other reason  
8 for Mr. Lewis' rejection. It's the only reason that  
9 Your Honor can conclude from this record that he was  
10 excluded.

11                  THE COURT: Okay.

12                  MR. HICKS: This case is likewise  
13 unique, Your Honor, and I was struck during the Court's  
14 exchange with General Kleinfelter about the application  
15 of the statute and the requirement, or the lack  
16 thereof, of a reason that could be reviewed by a  
17 commission for the rejection of a particular panel.  
18 And I think it is unique in this sense: It's  
19 difficult -- it's impossible, based on our efforts --  
20 to find a similar case.

21                  THE COURT: Right.

22                  MR. HICKS: And I would submit to the  
23 Court that the reason for that is because you don't see  
24 a reason, a discriminatory reason, spelled out as  
25 plainly as it is in this case, in any context, that is

1 the subject of any other reported decision.

2 And similar to the Court's discussion  
3 with General Kleinfelter, where General Kleinfelter  
4 said that the reason for the requirement of a written  
5 rejection and a written reason for the rejection is to  
6 put that reason into the court of public opinion, here  
7 it had the added benefit of informing Messrs. Gordon  
8 and Lewis that their rights had been violated.

9 We would submit, Your Honor, for the  
10 reasons stated, that the Court should invalidate the  
11 rejection of the July 18th panel and direct that the  
12 selection be made from the existing, as it exists now,  
13 July 18th panel.

14 THE COURT: Let's talk about that  
15 remedy.

16 What support do you have for that, what  
17 the Court should do if your side prevails, to send it  
18 back to the Governor to select from that panel, that  
19 first panel?

20 MR. HICKS: Your Honor, I would submit  
21 that the reason for that is the only other conceivable  
22 remedy would be if the Governor decided to reject again  
23 and ask for a third panel, essentially what the Court  
24 would be telling the plaintiff in this case is you've  
25 stated an illegal reason, you've stated an illegal



1 reason twice, now come up with one that's not illegal.

2 And I would submit that's not --

3 THE COURT: -- should not get the  
4 benefit of the illegality? That's --

5 MR. HICKS: Exactly.

6 THE COURT: -- one reason to go back to  
7 the first panel. It --

8 MR. HICKS: Exactly.

9 THE COURT: -- should not get the  
10 benefit of the illegality.

11 Any other policy reasons, that you  
12 derive from the statutory language, why that's the  
13 remedy the Court should select?

14 MR. HICKS: No, Your Honor. And I  
15 submit that that's sufficient.

16 And I'm happy to answer any more of the  
17 Court's questions; otherwise, I'm probably getting  
18 close to my designated amount of time.

19 THE COURT: Thank you very much. You've  
20 answered all my questions and provided me with  
21 excellent information in the papers as well as  
22 argument.

23 I think at this time the Court will take  
24 a 15-minute recess. Let's see, we'll come back, what,  
25 about five -- let's come back at five till.

1 (Recess)

2 MR. CANTRELL: May it please the Court,  
3 I am Ben Cantrell of the Nashville Bar, and I represent  
4 the defendant, the original defendant, the Judicial  
5 Selection Commission.

6 And I want to apologize to the Court,  
7 and to my client, for, in three different places in our  
8 papers, referring to them as the Appellate Court  
9 Nominating Commission. I guess old habits die hard.

10 THE COURT: I think it just demonstrates  
11 your experience.

12 MR. CANTRELL: I see Mr. Lewis in the  
13 audience, and I suspect he can relate to that.

14 And I want to thank the Court for your  
15 prompt setting of this case and the generous allocation  
16 of time for lawyers to argue.

17 Having had some experience in a court  
18 where oral argument is limited to 15 minutes a side, an  
19 hour of oral argument would begin to look like a  
20 filibuster to me.

21 May it please the Court, the problem of  
22 appointing or electing people to public office in the  
23 State of Tennessee, I wouldn't say it's been a vexing  
24 problem, but it's been a problem that the Courts have  
25 had to address some through the years.

1                   And the highest Court of this State has  
2 said that that power, the power of election or  
3 appointment to office, is a political power, and it's  
4 not inherently Legislative, Executive or Judicial, and  
5 one that may be vested with equal propriety in either  
6 branch. And this is demonstrated by the Constitutional  
7 history of this State.

8                   Under the Constitution of 1796, the  
9 Legislature made judicial appointments. And I suspect  
10 it could be documented that most judges were former  
11 members of the Legislature.

12                   But nevertheless, that system was  
13 continued in the Constitution of 1834, until it was  
14 amended in 1853 to provide that judges should be  
15 elected by the people.

16                   And under the Constitution of 1870, that  
17 provision was retained, as was Article VII, section  
18 four of the Constitution, which had been present in the  
19 1834 and 1853 Constitutions, which says the election of  
20 all officers and the filling of all vacancies not  
21 otherwise directed or provided by this Constitution  
22 shall be made in such manner as the Legislature shall  
23 direct.

24                   And the key words in that, of course,  
25 are "as the Legislature shall direct" and that's

1 exactly what they did when they passed the Tennessee  
2 Plan.

3           They divided the selection of some State  
4 officers, divided up between the Judicial branch and  
5 the Executive.

6           They created the Judicial Selection  
7 Commission and placed it in the Judicial branch and  
8 charged it with finding -- and I'm quoting the  
9 statute -- the best-qualified persons available for  
10 service on the Appellate Courts of Tennessee.

11           The Governor gets to choose one of the  
12 list of three of the best-qualified persons the  
13 Commission could find or the Governor may reject that  
14 list and ask the Commission to submit, quote, one other  
15 panel of three nominees, end quote.

16           And I'm going to return briefly to that  
17 point later.

18           But in the Tennessee Plan, the  
19 Legislature left the determination of qualifications of  
20 applicants for Judicial appointment largely to the  
21 expertise, or we might say the discretion, of the  
22 Commission.

23           The Legislature did say three things  
24 about qualifications: One, that nominees must be  
25 licensed to practice in Tennessee, and fully qualified

1 under the Constitution and the statutes to fill the  
2 office for which they're nominated, and any candidate  
3 that's been defeated in an election, under the plan, is  
4 not eligible for nomination until an August election  
5 has passed, and a person, once on the Judicial  
6 Selection Commission, is not eligible until they've  
7 been offered a position for two years.

8               So there are some exclusions, some basic  
9 minimum qualifications, that the Legislature put in the  
10 Tennessee Plan.

11               And if the nominees for the Supreme  
12 Court -- a person who resides in the grand division of  
13 the State, where there are already two members of the  
14 Court, is not eligible for consideration.

15               Other than that, the Commission may do  
16 its work free and untrampled and as we have read in  
17 some famous cases in Tennessee.

18               The Governor doesn't appear in this  
19 process until 17-4-112. And I think it's notable by  
20 its absence what the role of the Governor is.

21               The Commission is placed in the Judicial  
22 branch. It was the Chief Justice who convened the  
23 Commission for its first meeting and presided until a  
24 permanent chairman could be selected. And the support  
25 staff of the Commission is supplied by the

1 administrative office of the courts.

2                   So I think it can be said with a fair  
3 amount of confidence that the Commission is the sole  
4 judge of who the best-qualified people are for  
5 submission to the Governor for his consideration.

6                   And it must follow, then, that the  
7 Governor cannot dictate to the Commission the  
8 qualifications he would like for them to consider.

9                   Now, the Legislature was concerned about  
10 diversity, but they addressed it in creation of the  
11 Tennessee Plan by requiring the speakers who get to  
12 appoint the members of the Commission and the  
13 organizations from whom the speakers get their nominees  
14 for the Commission to be cognizant of the fact that  
15 diversity is important.

16                   In 17-4-102(c), 102(b)(1)(c)(2), it says  
17 if the nominees do not reflect the diversity of the  
18 State's population, the Speaker shall reject the entire  
19 list of the group and require the group to resubmit it,  
20 and each speaker, in making appointments, shall appoint  
21 persons who approximate the population of the state  
22 with respect to race, including the dominant ethnic  
23 minority population and gender.

24                   And in subsection D, each group and each  
25 speaker making a list of nominees and appointing

1 appointments respectively shall do so with a conscious  
2 intention of selecting a body which reflects a diverse  
3 mixture with respect to race, including dominant ethnic  
4 minority and gender.

5 Now, if the Court please, this lawsuit  
6 resulted from the fact that Mr. Gordon's name appeared  
7 on the second list that was submitted to the Governor.

8 Now, the Governor, in his lawsuit,  
9 doesn't say, gee, I'd really like to appoint Mr.  
10 Gordon, but I'm afraid that the list he's on is  
11 improper. He doesn't say, I would really like to  
12 appoint Judge Coch or Judge Bailey but I'm afraid that  
13 the list that they're on is -- that the list that  
14 they're on is somehow improper or illegal. What he  
15 said was that I don't want to appoint anybody on this  
16 list and I think that the list was illegal. He doesn't  
17 say otherwise than that.

18 Now, the Judicial Selection Commission  
19 responds that this lawsuit should be dismissed because  
20 the list the Governor has is a valid list. His only  
21 reason for filing this lawsuit is that it was not.

22 And there are three reasons why the  
23 Commission takes that position. The Governor says it's  
24 because Mr. Gordon's name was on the second list. And  
25 the statute does not say that a name on the first list

1 cannot exceed -- cannot appear on the second list.

2 And although we have not made a big  
3 point of that in our filing, we don't concede that  
4 point. And as Your Honor pointed out in your pretrial  
5 order, that is at issue in this case.

6 And so if a name that appears on the  
7 first list cannot appear on the second list, that's one  
8 possible outcome in this case. So let me address that  
9 briefly.

10 The Commission took this sending back of  
11 the first list and said that they would do it over.

12 Now, if that is a valid result that the  
13 Commission did, then there's nothing wrong with this  
14 list.

15 And it is a fundamental question, I  
16 think, under the Tennessee Plan that needs to be  
17 decided, that a name that appears on the first list  
18 cannot appear on the second list. All it says is that  
19 there will be another panel of three persons. And so  
20 that is the way the Legislature sought to word it in  
21 this case.

22 And I've read the legislative history of  
23 that Act, and if Your Honor can make much out of that,  
24 I'm grateful.

25 It seems to me that in the conversation



1 between Senator Wilder, Governor Wilder, and the other  
2 gentlemen who were debating that, they started from the  
3 position that what the Legislature was doing was taking  
4 something away from the Governor, some inherent right.  
5 It looks like they considered that the power of  
6 appointment was an executive function. And it's not an  
7 executive function. It can be placed in any of the  
8 three branches of the government. So I think that you  
9 can't get much out of the legislative history from  
10 that.

11               The Commission asks the Court to decide  
12 that fundamental question that the Governor presented  
13 to the Court; that a name on the first list cannot  
14 appear on the second list.

15               And one other thing I would point out  
16 about that, if the Court please: It does defy logic to  
17 a certain extent.

18               In selecting the very best-qualified  
19 nominees, the Commission would surely put them out on  
20 the first list, but that panel can be rejected, and the  
21 second set of nominees can't be selected -- can't be  
22 rejected.

23               And so it's as if the first team has  
24 been rejected and the second team has to be the one  
25 from which the nomination is made.

1 Now, I say that --

2 THE COURT: Let me ask you a point of  
3 clarification on that so I can appreciate your  
4 argument.

5 Under the construction that you've  
6 offered to the Court, would it be possible, then, to  
7 have a first panel, the Governor rejects it, and then  
8 the Commission sends back, as their second panel, the  
9 same people?

10 MR. CANTRELL: I would not argue that,  
11 Your Honor, that the Commission can simply send back up  
12 the second panel containing the same names.

13 THE COURT: In looking at the wording of  
14 the statute, is that because you're focusing on  
15 "panel," the word "panel," it's got to be a different  
16 "panel," meaning it could be comprised of one or two  
17 individuals on the first panel but there must be some  
18 difference, not necessarily a complete difference?

19 MR. CANTRELL: There must be some  
20 difference. And that the statute only requires that  
21 the Governor can ask for one other panel of three  
22 nominees.

23 And so I would not say that -- because I  
24 think that would give the Commission veto power over  
25 the Governor's discretion about who he wants to

1 appoint --

2 THE COURT: So you read it as one other  
3 panel of three nominees, not one panel of three other  
4 nominees?

5 MR. CANTRELL: It does not say one other  
6 panel of three nominees. It does not say --

7 THE COURT: So the operative term is  
8 really "panel" in looking at other -- all right.

9 MR. CANTRELL: Now, I say that, and I  
10 don't want anybody to tell Judge Koch or Judge Bailey  
11 that I referred to them as a second team, but lots of  
12 things go into --

13 THE COURT: I think we're going to have  
14 to all take an oath of secrecy on that. Okay, go  
15 ahead.

16 MR. CANTRELL: But A lot of things go  
17 into qualifications, if the Court please, and the  
18 Commission, in appointing members to the Supreme Court,  
19 takes into account a lot of factors; it's not  
20 necessarily what we would look at on a piece of paper  
21 and say these are the best qualifications. So it is  
22 not any slander of the second panel to say that they  
23 are the second panel.

24 But the first choice of the Commission  
25 can be rejected; the second choice can't. And that

1 seems, to me, to defy logic.

2 But the second point I want to make, if  
3 the Court please, the Governor's rejection of the  
4 remaining two names on the first panel fails to satisfy  
5 the statutory scheme because it exceeded the power  
6 given the Governor under the Tennessee Plan.

7 Now, I would say and concede the  
8 Commission has never taken the position that, under  
9 ordinary circumstances, they have the right to say to  
10 the Governor, well, the reasons you gave us are not  
11 sufficient.

12 If the Governor had said, I don't think  
13 they're the best qualified, well, as I say, that's an  
14 objective thing, and the Commission, I don't think,  
15 could say to the Governor, well, that's not a good  
16 enough reason. As I say, a lot of things go into  
17 qualifications.

18 But as we have pointed out at great  
19 length in our papers, the Governor said in this case  
20 that diversity is a significant factor that I believe  
21 should be considered.

22 And to be fair to the Governor, I'll  
23 read the last sentence in that paragraph: With  
24 Chancellor Dinkins' withdrawal, I no longer have the  
25 opportunity to consider that factor; I therefore

1 request that the Commission send a new panel of  
2 nominees that includes qualified minority candidates.

3 And so it seems to me that that crosses  
4 over the line that the Legislature has drawn, and the  
5 Governor is, in effect, dictating to the Commission the  
6 qualifications that he wants the nominees that appear  
7 on the second list.

8 Well, when the Commission got that  
9 response, it said, in effect, we don't think he can do  
10 that, but we'll do it over and we'll consider all of  
11 the applicants, even those that were on the first  
12 panel.

13 As the Commission has pointed out, the  
14 Tennessee Plan does not give the Governor the power to  
15 specify the qualifications, even for the laudable  
16 purpose of maintaining diversity on the Supreme Court.  
17 The Commission's charge by the Legislature is to find  
18 the best-qualified people to send to the Governor for  
19 his consideration. So --

20 THE COURT: I need to ask you a  
21 clarification on the facts.

22 It's been awhile since I read the  
23 resolution that was passed by the Commission in  
24 response to the Governor's July 24 -- well, no, I guess  
25 it would have been the -- it would have been their

1 response to the Governor's rejection.

2 In that resolution, I think it is, do  
3 they state that they're doing it over? Do they  
4 characterize it as a second panel? I can't recall.

5 MR. CANTRELL: I don't recall  
6 specifically, Your Honor, but I don't think they say  
7 this is a do-over or this is a second panel.

8 What they do say is we think that  
9 rejection of people on the first panel, because of  
10 their race, violates their Constitutional rights and --  
11 but we're going to send up another panel but we're  
12 going to let everybody that was on the first panel  
13 that's still there --

14 THE COURT: Yes, it is noncommittal in  
15 that respect. Okay.

16 MR. CANTRELL: -- we're going to allow  
17 them to reapply. And they did. And Mr. Gordon  
18 appeared on the second list.

19 So for the Governor to say to the  
20 Commission, in rejecting the first panel, that he wants  
21 them to send qualified minority candidates, I think the  
22 Governor has exceeded the power given to him under the  
23 Tennessee Plan.

24 The next reason why we think that the  
25 rejection of the first list was improper is the

1 Tennessee Human Rights Act. And the Court has heard a  
2 lot of talk already about that from the Attorney  
3 General and from Mr. Lewis.

4 In the Tennessee Human Rights Act, it  
5 plainly says that it is discriminatory practice for an  
6 employer to discharge any person or otherwise  
7 discriminate against an individual with respect to  
8 compensation terms, privileges of employment because of  
9 the individual's race, creed, color, religion, sex,  
10 age, or national origin, or it's a discriminatory  
11 practice to limit, segregate or classify an employee,  
12 or applicants for employment, in any way that would  
13 deprive or tend to deprive an individual of employment  
14 opportunities or otherwise adversely affect the status  
15 because of race, creed, color, et cetera.

16 Now, the Governor, in sending the first  
17 list back, plainly said, I'm not going to consider the  
18 remaining two names on this list because of their race.

19 Now, the Attorney General wishes to give  
20 the Governor a pass on that because the Attorney  
21 General says the Governor is not an employer and that  
22 the people are the employers of members of the Supreme  
23 Court.

24 It seems to me that's simply another way  
25 of saying that the State is the employer, and the State

1 is defined in the Act as an employer, and when the Act  
2 says it's a discriminatory practice for an employer to  
3 discriminate in hiring questions or it's a  
4 discriminatory practice to limit, segregate or classify  
5 an employee -- and the Governor is, after all, the  
6 chief executive officer of the State --

7 THE COURT: I think employer includes  
8 agent, and he would be acting as the agent of the State  
9 in performing this duty.

10 MR. CANTRELL: I think Your Honor is  
11 absolutely right.

12 And if he's going to say, I'm not going  
13 to consider you because you're not of the right race,  
14 it seems to me that that is the State discriminating  
15 against those persons.

16 Now, I think all of that is answered --

17 THE COURT: Yes, it says or any person  
18 acting as an agent of an employer, directly or  
19 indirectly. That's in 42-1-102(4). So it is  
20 expansive. Okay.

21 MR. CANTRELL: And that is exactly  
22 correct, Your Honor.

23 Now, I think all of that is answered by  
24 the Supreme Court case of Sanders versus Lanier, where  
25 Judge Lanier was a circuit judge down in West



1 Tennessee, Ms. Sanders was an employee of the County,  
2 she was a youth services officer in the Juvenile Court,  
3 and Judge Lanier also had Juvenile Court jurisdiction.  
4 And he, according to the Supreme Court, discriminated  
5 against her on the basis of sex.

6 He's a State judge, she's a County  
7 employee, and yet the Supreme Court said that that  
8 falls within the THRA.

9 And Justice Holder put it in sort of a  
10 unique way. He says, the Act does not require that the  
11 plaintiff be an employee of the employer.

12 So the Act certainly covers the Governor  
13 as the chief executive officer of the State, and for  
14 him to say I'm not going to consider you for  
15 appointment to the Supreme Court because you're not of  
16 the right race, then I think that violates the  
17 Tennessee Human Rights Act.

18 The Governor has also questioned the  
19 standing of the Commission to rely on that. But it  
20 seems to me that for two reasons the Commission can  
21 rely on it. It is another limitation on the Governor's  
22 power, and if the Commission acquiesced in that, then  
23 it would become part of the discrimination. And so the  
24 Commission can say, I think, that that's not a valid  
25 reason to reject a panel of nominees to the Supreme

1 Court.

2 Now, Your Honor asked the Attorney  
3 General some questions about the remedy under --

4 THE COURT: Yes. Before we get to the  
5 remedy, let me ask you about the interplay between the  
6 Tennessee Human Rights Act and Title VII.

7 We're all aware of that case law that  
8 says, in interpreting the Tennessee Human Rights Act,  
9 we should look to the Federal Act.

10 We do have, in this case, that an  
11 exemption contained in the Federal Act is not in our  
12 Tennessee version of it.

13 I had asked General Kleinfelter if there  
14 was any case law, any discussion in Tennessee law,  
15 about what extent we follow the Federal Act when our  
16 Act contains a different provision. Do you have any  
17 information on that or if there's any precedent?

18 MR. CANTRELL: I'm embarrassed that Your  
19 Honor asked me that. I am saying to the Court that I'm  
20 confident that there are some authorities in this state  
21 that say that in that respect that THRA differs from  
22 Title VII because Title VII has an exemption for  
23 policy-making employees --

24 THE COURT: Right.

25 MR. CANTRELL: -- while the Tennessee

1 Act does not.

2 Now, as I say, I'm embarrassed not to  
3 have cited that to the Court.

4 THE COURT: Well, I have not compared  
5 the exact language. That's on my list of things to do.  
6 And that may be one of the few differences, and if it  
7 is one of the few differences, then that could either  
8 underscore its significance or you might could draw a  
9 different inference, but that may be why we don't have  
10 much knowledge or information from counsel present on  
11 that point.

12 But you obviously accord it significance  
13 if the Legislature did not adopt that exemption in our  
14 version of this legislation.

15 MR. CANTRELL: Yes, Your Honor. Now,  
16 the Attorney General argues that it is important for  
17 the Governor to consider race in making appointments to  
18 the Supreme Court. I agree with that, the Commission  
19 agrees with that, but the -- that the Governor can't  
20 discriminate against people. If the roles in this case  
21 were reversed, would there be any question but what the  
22 Governor can't do that, if he had said, to a black  
23 applicant, you can't apply or I'm not going to consider  
24 you?

25 Now, the Attorney General says, well,

1 he's trying to maintain diversity, and that's  
2 important.

3 Well, the Tennessee Human Rights Act  
4 provides for that, if the Court please. They -- an  
5 agency can adopt a remedial plan if they will submit it  
6 to the Human Rights commission, and if the Governor  
7 found that there was an imbalance on the Supreme Court  
8 and submitted it to the Commission for its approval,  
9 then the Governor maybe can discriminate in favor of  
10 one race or the other. So that --

11 THE COURT: Where is that provision in  
12 the Act? Do you have a cite for that?

13 MR. CANTRELL: I don't have the --

14 THE COURT: There is a specific, I  
15 guess, procedure on that.

16 MR. CANTRELL: Let me see if I brought  
17 that with me.

18 MS. KLEINFELTER: Your Honor, I believe  
19 it's T.C.A. 42-1-406(b).

20 THE COURT: Okay. Thank you.

21 MR. CANTRELL: Of course, none of that's  
22 happened in this case. And I don't criticize the  
23 Governor for taking that into account; the Commission  
24 does not criticize him for that.

25 So for that reason also we think that

1 the list before the Governor is a valid list.

2 Now, on the last point -- and that's the  
3 point raised by Mr. Gordon -- that the dropping off of  
4 a nominee makes the list invalid, the Commission's  
5 position on that is that they faced it once before, and  
6 that the Governor simply went ahead and made the  
7 appointment from the two remaining names on the list.  
8 That is, I think, the only instance where that's  
9 happened.

10 THE COURT: Right.

11 MR. CANTRELL: And you might say, well,  
12 that's not much of a practical construction, but it is  
13 the construction that the Governor and the Commission  
14 put on it.

15 I think the Governor could, under his  
16 authority given to him under the Tennessee Plan, have  
17 said, to the Commission, here, fill up the list,  
18 appoint somebody else to go on this list -- or nominate  
19 somebody else to go on this list.

20 And, in fact, that's what the Commission  
21 thought maybe he'd done when they inquired, did you  
22 intend to reject the whole list.

23 And I think if he'd said, no, I didn't  
24 intend to reject the whole list, they would have filled  
25 it up and he would have had three persons. He didn't

1 do that.

2                   And so I think it's up to the Governor  
3 to do what he wants to with the list when somebody,  
4 after it gets that far, asks to be -- not to be  
5 considered. The Governor can say, I reject this list,  
6 I want you to nominate somebody else to fill up the  
7 list, or he can appoint from the other two members on  
8 the list.

9                   So with those points, Your Honor, we  
10 think that the list before the Governor is a valid list  
11 and this lawsuit should be dismissed.

12                   Now, the Court has asked about remedy,  
13 and I think that, in all of the choices the Court has  
14 to make, there is -- if the Court makes all of them in  
15 a certain way, we would all arrive at the same point,  
16 and that is the list before the Governor is now the  
17 first list.

18                   If, in fact, the name that appeared on  
19 the first list cannot appear on the second one, I think  
20 that makes this the first list, and the Governor can  
21 reject it and ask the Commission to do it over or to  
22 give him a second list of three nominees.

23                   I don't think that it's, under any of  
24 the choices that the Court has to make, that it's  
25 necessary that we just start over completely.

1                   The Governor has had five names, five  
2 different names, already, and so I think that the  
3 Governor can make his choices from this list, or if the  
4 Court considers that this is the first list, he can  
5 reject the names if he doesn't want to appoint from  
6 this list, and the Commission will undoubtedly send him  
7 a list with three other names.

8                   So I appreciate the Court's time,  
9 appreciate you getting to this in an expedited manner.  
10 Thank you.

11                   THE COURT: Thank you very much. Mr.  
12 Bone?

13                   MR. CHARLES W. BONE: Thank you, Your  
14 Honor. My name is Charles Bone, I guess Charles W.  
15 Bone, and along with my son, Charles Robert Bone, and  
16 Tim Smith from Memphis, we represent Houston Gordon in  
17 this matter.

18                   I think -- I'll try to be as brief as  
19 possible because this case has certainly been well  
20 argued from all sides and the Court has had very  
21 insightful questions.

22                   Houston Gordon's greatest fear, with  
23 respect to the proceedings that we have before Your  
24 Honor, is not that in some way he's never going to be  
25 on the Supreme Court of Tennessee, because he is pretty

1 close to concluding that that's probably the case  
2 whatever the politics might be; his greatest concern is  
3 for the Tennessee Plan, and for the Tennessee Plan  
4 actually not in today's environment with today's  
5 players, today's officials, because I think all of us,  
6 all of us are friends, all of us have worked together  
7 many years in a lot of different capacities as lawyers.  
8 The Judicial Commission has just an unbelievable  
9 record, I think, Houston Gordon thinks, as having  
10 achieved the goal of the Tennessee Plan, and that is to  
11 raise the selection of judges above politics.

12 And I think we've all been supporters  
13 and admirers, and certainly the Governor is well loved  
14 and well respected. And even if he made a mistake here  
15 in the way he procedurally handled this matter, we  
16 don't subscribe any evil intent to him at all.

17 I find it a little interesting that  
18 General Kleinfelter uses, in her brief and in her  
19 argument, the issue of the Governor's sincerity,  
20 because I think that does lead into issues of material  
21 facts.

22 But I think, as Your Honor has  
23 identified in her opinion last week, these matters can  
24 be resolved on the preemptive procedural issues without  
25 ever reaching the issues addressed by the Constitution



1 and by the Tennessee Human Rights Act.

2 And I think we simply say that the  
3 premise of the elaborate statutory scheme that we have  
4 in front of us is for the Governor to have in front of  
5 him, or her, a panel, or panels, of three nominees,  
6 three names to choose from, and any construction  
7 otherwise creates the opportunity for mischief. We can  
8 use any word you want to put in that blank, but during  
9 the night, that's the word that I selected.

10 And I think that's demonstrated when you  
11 begin to look at these hypothetical situations. And,  
12 again, General Kleinfelter and Your Honor had an  
13 exchange about that.

14 But, you know, the exchange that I had  
15 with Mr. Gordon early this morning was along the lines  
16 of, okay, so one withdraws and the next one dies, and  
17 perhaps then -- I'll leave that as a dangling  
18 question -- and then for some reason there is a second  
19 panel in another situation, or the same situation,  
20 where all three, for whatever reason, die or withdraw,  
21 for whatever reason, then are we left under this  
22 statutory scheme -- and I think, as the State has  
23 suggested, we would be -- we're left with a vacancy  
24 that we cannot fill, or we'd have to start all over  
25 again if we could declare the vacancy renewed.

1                   THE COURT:  If we have one of those  
2 situations, it certainly frustrates the scheme of the  
3 statute to have three nominees for the Governor to  
4 consider.

5                   The Court studied that at length, which  
6 led me to that 17-4-109(d), and that very interesting  
7 language that the Commission -- I think they say shall  
8 endeavor to encourage qualified attorneys to agree to  
9 serve, contrasted to E, where it just says that they  
10 shall fill the vacancy and certify the names, et  
11 cetera.

12                  That language, I have to say, gave me  
13 pause when I considered their argument.

14                  What do you make of that?

15                  MR. CHARLES W. BONE:  Well, and  
16 certainly I agree with Your Honor, that that's -- I  
17 mean that's the --

18                  THE COURT:  Is it just aspirational as  
19 opposed to mandatory?

20                  MR. CHARLES W. BONE:  Well, I think it's  
21 both.

22                  And I think when you read it also with  
23 respect to 101, the purpose of the Tennessee Plan --  
24 and, again, the history of the Tennessee Plan is  
25 considered where we want to have the best -- 101(a) is

1 the best-qualified persons on the court, to insulate  
2 the judges of the court from political influence, to  
3 improve the administration of justice, enhance the  
4 prestige and the respect of the courts. You know, I  
5 think with that kind of legislative mandate, you know,  
6 the Judicial Commission has got to be given some  
7 discretion in terms of how they present the Governor  
8 with three names, three nominees.

9                   And I think the -- obviously, Your Honor  
10 hears lawyers stand before her every day and say, you  
11 know, the language of this statute or the language of  
12 this contract is perfectly clear and it should be read  
13 the way I say it should be read. Well, you know, I  
14 don't see how any of us can, with a straight face, you  
15 know, make that argument to Your Honor.

16                   I mean somebody, Your Honor or others  
17 above her, are going to have to say, you know, look,  
18 this is what this is, this is -- you know, when you  
19 take all of this and put it together, and you take it  
20 out of the context of a well-intentioned, very  
21 professional, great history for the Judicial Selection  
22 Commission, and you take out a well-intentioned  
23 governor and put in their place people who might want  
24 to do something that's not as acceptable as what these  
25 folks might want to do here, then this decision is

1 absolutely essential, and to me, I think it's plain,  
2 Houston Gordon thinks it's plain, to give the Governor  
3 three nominees is the highest and best purpose of these  
4 statutes.

5                   Now, I'd love to stand here and agree  
6 with Mr. Hicks and say that the Governor has only one  
7 choice, the remedy is the Governor has to decide  
8 between Mr. Lewis and Mr. Gordon, but in good  
9 conscience, if it please the Court, we, you know, we  
10 think, Mr. Gordon thinks, that just contributes to the  
11 opportunity for mischief because, then again, you know,  
12 for whatever reason, at some point, rather than people  
13 withdraw for good reasons, people might withdraw for  
14 other reasons, for reasons that they should not be --  
15 should not be allowed to withdraw from or should not be  
16 recognized for.

17                   So that's the reason we promote -- we  
18 suggest that Your Honor can fix this procedurally by  
19 giving, in fact, the Governor the greatest latitude of  
20 all by saying go back to panel one, you know, and let  
21 the Judicial Commission add a third person.

22                   THE COURT: Right.

23                   MR. CHARLES W. BONE: And then if you  
24 reject that panel for legal -- I can't see any way  
25 that --

1 THE COURT: And you see no statutory  
2 impediment to that remedy with the contrast between  
3 17-4-109(d) and (e), you think?

4 MR. CHARLES W. BONE: I just --

5 THE COURT: That's not a problem?

6 MR. CHARLES W. BONE: We just -- again,  
7 when you read this in the context of the facts that are  
8 before the Court, and, you know, and when you consider  
9 the, I guess the purpose statement of 101, and blend  
10 all of that together as, obviously, Your Honor is  
11 required to do, unless it's clear on its face, and to  
12 the --

13 THE COURT: And let me --

14 MR. CHARLES W. BONE: Excuse me. Go  
15 ahead.

16 THE COURT: -- just develop that  
17 argument with you.

18 You have tapped into the policy  
19 statement in 17-4-101 for your argument. If the Court  
20 were to conclude that a condition precedent to the  
21 Governor exercising his selection or rejection is that  
22 he have three persons to consider, does that assist,  
23 effectuate, promote this policy of enhancing whether to  
24 make the Courts nonpolitical?

25 MR. CHARLES W. BONE: Oh, I think

1 absolutely it does, Your Honor.

2 THE COURT: Develop that for me.

3 MR. CHARLES W. BONE: Well, and again --

4 THE COURT: And the reason I ask you  
5 this question, as you've said to me from the beginning,  
6 I'm going to make a policy argument in part, Mr. Gordon  
7 has charged me with that duty this morning. And so I  
8 want --

9 MR. CHARLES W. BONE: Right.

10 THE COURT: -- to probe that with you,  
11 develop that point --

12 MR. CHARLES W. BONE: I think it is  
13 policy and I think it is logic and I think it's just  
14 pure common sense.

15 THE COURT: How does it enhance making  
16 the Courts nonpolitical to say you've got to have three  
17 persons?

18 MR. CHARLES W. BONE: And I think --  
19 let's take it out of the context, again, of the history  
20 that we have of the last year. And let's say that in  
21 another situation where there are originally three  
22 nominees, for whatever reason there's some political  
23 influence that causes a nominee to withdraw.

24 THE COURT: Okay.

25 MR. CHARLES W. BONE: If -- or two

1 nominees to withdraw. You know, again, the intent, the  
2 purpose, the legislative purpose, of this would be to  
3 say, let's give the Governor a fair chance to consider  
4 three nominees who have been certified by this panel,  
5 rather than to just be required to choose from among  
6 two or required to choose between only one or reject.

7           And, you know, again, what we -- I think  
8 what we realize here, as we get into this, this is, you  
9 know, this is a classic balance of power struggle, you  
10 know, that we've got to resolve in some way. And  
11 again, for us, I think, we say the Legislature creates  
12 the scheme, the Judicial Commission certifies nominees,  
13 screens, encourages, endeavors to find the right  
14 nominees, and then finally the Governor gets to choose  
15 between those three nominees.

16           So it would just seem, again, to us --  
17 and that's pure logic, if it please the Court, I think,  
18 that when you take this into account, that that logic  
19 says give the Governor the maximum number of names from  
20 which to choose so that you get the very best slate  
21 before him each time it's before him.

22           And I think that -- if that -- if Your  
23 Honor agrees that that resolution is appropriate, then  
24 we never have to go, --

25           THE COURT: Right.

1 MR. CHARLES W. BONE: -- you know, we  
2 never have to go anyplace else; we don't have to go to  
3 any of these issues where you've got to rewrite a lot  
4 of different things, where you've got to find whether  
5 the Governor did, you know, violate the statutes or the  
6 Constitution. All you've got to do is focus on this  
7 one purpose that procedurally is -- should be one that  
8 all of us could potentially agree is a valid one and an  
9 acceptable one.

10 I think otherwise -- and, you know,  
11 again, during the Attorney General's argument -- and  
12 there's no reason for me to go beyond the discussion  
13 the Court has already had -- but it was during the  
14 argument on the THRA, General Kleinfelter said  
15 something about the only option available to the  
16 Governor.

17 And I think, again, to me, the last  
18 thing the legislative intent suggests is that there be  
19 a trap where the Governor has only one, you know, only  
20 one option, you know.

21 And again, we can all dream out the  
22 hypotheticals where, you know, where those things,  
23 those factual situations, could be created.

24 So I think that's where -- I guess the  
25 only other comment that I feel compelled to make -- and



1 I'm glad to respond to any questions Your Honor has,  
2 but this has really been so well argued -- I can't  
3 imagine that we can take a position that the Governor  
4 can give just any reason for rejection, you know, that  
5 there's not an assumed qualifier there that's any legal  
6 reason, and that -- because I think that's certainly a  
7 stretch. Now, I --

8 THE COURT: Even if we -- you know,  
9 there are two ways you can go on that. Even if the  
10 Court doesn't accord the meaning to giving a written  
11 rejection to the Commission as kind of oversight  
12 authority about the Commission, the Governor is not  
13 permitted to violate the law, so we have that premise.

14 I guess my question on that -- we've had  
15 a thorough argument on the Tennessee Human Rights Act.  
16 There are a few loose ends that I need to look up.  
17 Before we talk about that, where I could really use  
18 some assistance is if you have any thoughts or  
19 information on the Equal Protection argument. That is  
20 primarily Intervenor Lewis' claim.

21 Is there anything you would like to add  
22 to that?

23 MR. CHARLES W. BONE: Our brief, if Your  
24 Honor please, if I could just potentially cite you to  
25 pages 11 and 12 -- let me see exactly how that's

1 styled -- Intervenor's Memorandum of Law in Opposition  
2 to Plaintiff's Motion for Summary Judgment and in  
3 Support of Intervenor's Motion for Summary Judgment on  
4 Plaintiff's Counter-Complaint. Pages 11 and 12  
5 address, and specifically note, the Equal Protection  
6 issue and discusses the Gregory versus Ashcroft case in  
7 1991 by the United States Supreme Court, and we kind of  
8 include that section in our brief, with a quote from  
9 Justice O'Connor, certain -- where she says the  
10 authority of the people of the states to determine the  
11 qualifications of governmental officials is, of course,  
12 not without limit.

13                   And then we underlined the next phrase:  
14 Other Constitutional provisions, most notably the 14th  
15 Amendment, prescribe certain qualifications. Our  
16 review of citizenship requirements under the political  
17 function exception is less exacting, but it is not  
18 absent.

19                   That's Gregory versus Ashcroft. And  
20 there's a line of cases cited there --

21                   THE COURT: Why would this case not fit  
22 into the political function exception?

23                   I want to put aside genuine issues of  
24 material fact, and so we won't go into, you know, the  
25 reasons given and all that, but why, just on the

1 undisputed facts, why wouldn't this fit into that  
2 political function exception to the Equal Protection  
3 Amendment?

4 MR. CHARLES W. BONE: Well, again, we  
5 go -- I'm trying to come up with a short answer to  
6 that. Let me --

7 THE COURT: And, again you're the policy  
8 man, sort of, in this argument, so what I would really  
9 like to hear from you on that is what -- and I think  
10 this is consistent with the charge that Mr. Gordon gave  
11 you -- what kind of policy are we forging in this state  
12 if we make these appointments by the Governor  
13 subject -- we don't give him the exemption that we have  
14 in the Federal law, and we narrowly construe this  
15 political function exception?

16 What sort of policy is that setting with  
17 respect to the Tennessee Plan?

18 MR. CHARLES W. BONE: From a policy --  
19 just one aside, if Your Honor please: My law partners  
20 would appreciate your characterization of me as a  
21 policy man because what they say is I'm not much of a  
22 lawyer, so I'll be sure and quote you on that.

23 So let me say I'm not ashamed to stand  
24 here and say that the Governor should be bound in  
25 his -- and I don't -- and I don't think the Governor,

1 except in an isolated case like our Governor, our  
2 present Governor, except in this isolated situation,  
3 would ever ask for that exemption, based on his record  
4 with respect to human rights and diversity. And I  
5 guess that's the reason that it's so awkward for  
6 Houston Gordon or Charles Bone to stand here, because  
7 of what we believe in and have fought for in a lot of  
8 different places, to stand here and say in this one  
9 instance -- in this one instance the Governor simply  
10 overlooked the obligation that he had. And I really  
11 believe he was trying so hard to do good, to do what  
12 was right, to keep the Court from being all white, that  
13 he simply overlooked that requirement. That, I think,  
14 if Your Honor please, irrespective of the Equal  
15 Protection clause, the Tennessee Human Rights Act just  
16 hits him squarely in the face here, and if anything in  
17 this entire discussion is clear, I personally think  
18 that is abundantly clear.

19 THE COURT: And is that because the  
20 Tennessee Human Rights Act doesn't have that exception  
21 or exemption that we have in the Federal Act? You  
22 think that speaks volumes?

23 MR. CHARLES W. BONE: Exactly. It's  
24 broader than the Federal Act.

25 And clearly here, we submit that the

1 State is the employer. I mean there's just --  
2 certainly lawyers can always argue the other side, but  
3 we think it's clear here that the State is the  
4 employer.

5 And I guess that's the reason we hadn't  
6 gone there until Your Honor asked, because we don't  
7 think we have to go there. And we don't think that  
8 it's necessary to get to a finding there.

9 And I really would suggest that if we're  
10 going to go there, there are probably some other facts  
11 that are essential to the Court that need to be  
12 developed.

13 And, again, we tried to get on the train  
14 and keep this moving.

15 And the only other thing I would  
16 suggest, that these real lawyers suggest to me --  
17 including Mr. Hooper, who I think has left -- is that  
18 if we're going to be in this Constitutional realm, you  
19 know, it's certainly conceivable that this case is  
20 going all the way to the United States Supreme Court  
21 and we're going to be left with four justices for a  
22 long time. And that's the reason we so earnestly  
23 believe that this procedural preemptive issue can be  
24 the solution to our concerns here.

25 THE COURT: Thank you.

1                   MR. CHARLES W. BONE: I don't think I  
2 have anything else to add unless Your Honor has more  
3 questions.

4                   THE COURT: No, sir. Thank you.

5                   General Kleinfelter, let me tell you  
6 what the Court's constraint is. I have three  
7 settlements that I need to hear. They were supposed to  
8 start at 11:30. We've put them off until noon. I had  
9 anticipated that we would break for lunch and I would  
10 hear them during my lunch break.

11                  Would you -- I can probably finish them,  
12 I don't know, maybe in 20 minutes or so. Do you-all  
13 want to take a 20-minute break, let me do that, and you  
14 can come back in? Do you want to take a lunch break?  
15 How do you want to handle it?

16                  I really cannot impose on them any  
17 longer.

18                  MS. KLEINFELTER: No, I certainly  
19 understand, Your Honor.

20                  I think probably it would be preferable  
21 with everybody -- I actually have a 2 o'clock meeting  
22 that I'm hoping to make it back in time for, and so I  
23 think it would be preferable for me if we would just  
24 take that 20-minute break and come back.

25                  THE COURT: Good.

1 MS. KLEINFELTER: And the response that  
2 we have is not going to be very long. It shouldn't  
3 take more than 10 to 15 minutes.

4 THE COURT: Well, what I will do, this  
5 matter will be in recess for 20 minutes. We'll come  
6 back at 12:15. I'll have the clerk take those parties  
7 back in the jury deliberation room so you-all don't  
8 have to move anything, and we'll start back up at  
9 12:15.

10 MS. KLEINFELTER: Thank you, Your Honor.

11 (Recess)

12 MS. KLEINFELTER: Your Honor, I'm going  
13 to try and be brief here and respond to some of the  
14 arguments, the points and the issues, that were raised  
15 in the arguments by the Commission and the intervenors'  
16 counsel.

17 I think the one issue that I want to  
18 start with and address right off the bat are the  
19 issues, the arguments, that have been raised with  
20 respect to the Tennessee Human Rights Act.

21 The first point I'd like to make there,  
22 your Honor, I think it was counsel for Mr. Lewis who  
23 made the assertion that the THRA is violated whenever  
24 diversity plays a role in an employment decision, and,  
25 Your Honor, we would submit that is contradicted by the

1 provisions of the Tennessee Human Rights Act itself. I  
2 mean, in fact, the provision that Judge Cantrell  
3 referred to when he gave you the cite T.C.A. 42-1-406,  
4 in which the Act contemplates that you can, in fact,  
5 have an affirmative action plan that takes diversity  
6 into account. And it would certainly defy all logic to  
7 say that diversity can't be considered in employment if  
8 the Act itself says that you can consider it through a  
9 plan.

10                   Now, Judge Cantrell pointed out  
11 obviously there is no plan here, but that is because --  
12 and that kind of leads to the second point -- is, is  
13 that there was no need to file a plan because the  
14 Governor is not acting as an employer. And that kind  
15 of leads to the argument that Judge Cantrell was trying  
16 to make, or the point he was trying to make, and that  
17 is, is that, oh, well, the Governor simply -- the State  
18 of Tennessee is the employer and the Governor is acting  
19 as the agent of the State of Tennessee.

20                   But, Your Honor, that argument ignores  
21 the fact that the -- if this is, in fact, an employment  
22 decision that is being made here, the ultimate  
23 appointment of an individual to fill the -- temporarily  
24 fill the vacancy on the court until there can be an  
25 election -- if that, in fact, is an employment



1 decision, then the Commission plays just as equal a  
2 role in that employment decision. They ignore the fact  
3 that it is essentially a symbiotic relationship between  
4 the Commission and the Governor. The Governor doesn't  
5 act --

6 THE COURT: In a vacuum.

7 MS. KLEINFELTER: -- in a vacuum. He  
8 only acts after the Commission has presented to him  
9 that panel of three nominees.

10 And again, I think, as we discussed in  
11 my opening argument, all three of them have  
12 acknowledged that the Commission is, by statute,  
13 supposed to have diversive -- diversity in its makeup.  
14 And if diversity is so important in the makeup of the  
15 Commission itself, then clearly, the work, the work of  
16 the Commission should reflect that diversity.

17 And I think the Commission itself has  
18 said that they are the sole judge of the  
19 qualifications, and they are the ones who are to take  
20 into account diversity.

21 Well, if it's okay for them to do that  
22 and not be in violation of the Human Rights Act, then  
23 why is it a violation for the Governor to take  
24 diversity into account? It can't be a violation for  
25 one but not for the other.

1                   It is either not a violation because  
2 this is not an employment decision, or if it is a  
3 violation, it is a violation by both the Commission and  
4 the Governor, together.

5                   And we would submit, of course, it's not  
6 because it's simply not applicable.

7                   THE COURT: So you would assert that the  
8 Commission is also not governed by the Tennessee Human  
9 Rights Act?

10                  MS. KLEINFELTER: Yes, Your Honor. And  
11 the third point we'd like to make -- and that gets into  
12 this whole idea of what is an employer under the Human  
13 Rights Act -- and I think a lot of emphasis has been  
14 placed upon the fact that the exception for high-level  
15 policymakers is not contained in the Act, the exception  
16 that's in Title VII.

17                  Interestingly, Your Honor, none of the  
18 exceptions that are found in Title VII are contained in  
19 the Tennessee Human Rights Act, and that includes an  
20 exception for elected officials, and yet I would find  
21 it utterly amazing that an elected official would bring  
22 a cause of action against an electorate.

23                  THE COURT: That was an item on my list  
24 that I didn't get to; comparing the text of Title VII  
25 to the Human Rights Act.

1                   Do you know what the other exceptions  
2 are? I mean it might -- well, I'll look at it later,  
3 but --

4                   MS. KLEINFELTER: Mr. Helou, with our  
5 office, actually is the one who is more familiar with  
6 the specific exceptions. He can certainly --

7                   THE COURT: I will look at it, but I  
8 thought that might prove helpful --

9                   MS. KLEINFELTER: I mean I can say for a  
10 fact that elected officials are -- there are four  
11 categories of exceptions: One is high-level  
12 policymaker; one is elected officials -- actually it  
13 may be referred to in our brief, Your Honor.

14                   I think it's the staff and their cabinet  
15 members --

16                   THE COURT: Okay.

17                   MS. KLEINFELTER: -- are what are  
18 excluded.

19                   THE COURT: I'll compare it because  
20 that's something I --

21                   MS. KLEINFELTER: Right. It's elected  
22 state officials, the personal staff of elected state  
23 officials, appointees by elected state officials on the  
24 policymaking level, and immediate advisors to elected  
25 state officials who advise those officials on the

1 exercise of the powers of the office. And none of  
2 those exclusions, those exceptions, are included in the  
3 Tennessee Human Rights Act. And yet, again, how an  
4 elected state official, how a representative could sue  
5 the electorate of the State of Tennessee for violation  
6 of Title VII, I don't see where you could find a cause  
7 of action -- I mean it's not under Title VII -- but for  
8 violation of the Tennessee Human Rights Act, where you  
9 could have that cause of action.

10 I think, Your Honor, we've pointed out  
11 that, in construing the word "employer" in the  
12 Tennessee Human Rights Act, that this Court can and  
13 should look to Title VII and look to that policy  
14 determination that Congress has made with respect to  
15 Title VII, and find -- or in construing that the term  
16 "employer" -- to include that exception for high  
17 policymaking officials.

18 That would be -- would comport with the  
19 Legislature's directive that, in the very first section  
20 of the Tennessee Human Rights Act, that it be construed  
21 and embody the policies of Title VII of the Federal  
22 Civil Rights Act.

23 I'd like to address just some real  
24 specific arguments that were made first by -- I think  
25 by counsel for the Judicial Selection Commission, and

1 then counsel for the intervenors.

2 First of all, with respect to the  
3 Judicial Selection Commission, I think counsel made the  
4 argument that they are the sole judge of the  
5 qualifications.

6 Your Honor, if you look at the language  
7 of the statute, what it says is, is that they are to --  
8 by using that -- they use this phrase, who it deems to  
9 be the best qualified.

10 By using that language, who the  
11 Commission deems to be best qualified, first of all,  
12 it's a clear recognition by the Legislature that who is  
13 best is necessarily a subjective determination.

14 There are some minimum -- as the  
15 Commission pointed out, there are some minimum  
16 statutory qualifications that have to be met, but  
17 beyond that point, it is subjective as to who the  
18 Commission deems best.

19 And there's nothing in the Act that  
20 would suggest that once they have made their  
21 determination, that the Governor, then, cannot apply  
22 his own subjective criteria in deciding who he ought to  
23 appoint or not appoint or reject the entire panel.

24 So to argue that -- again, Your Honor, I  
25 heard both -- I heard counsel for, certainly for the

1 Commission and for Mr. Gordon say that the Commission  
2 should have discretion, they should be able to exercise  
3 their discretion, they should be able to make these  
4 subjective determinations without any oversight,  
5 without the Governor dictating to them what they ought  
6 to do.

7                   You know, specifically that was one of  
8 the arguments that the Commission raised, is that the  
9 Governor cannot dictate to them.

10                   And yet, Your Honor, that is, in  
11 essence, what they want to do with the Governor. They  
12 want to say that while we can exercise our discretion  
13 and make our subjective determinations, unfettered,  
14 Governor, you can't -- Governor, your exercise of  
15 discretionary authority is subject to, first of all,  
16 our oversight, our decision as to whether or not we  
17 think you properly exercise, your reasons are valid  
18 reasons.

19                   And there's simply nothing in the  
20 statute that would support that. And I think, as Your  
21 Honor pointed out, what kind of a policy does that set  
22 for the State of Tennessee in the future if we are  
23 going to constrain the Governor's ability in making  
24 high-level appointments and appointing Constitutional  
25 officers?

1                   In addition, with respect to the issue  
2 that was raised by the Governor, the construction of  
3 17-4-112(a), and what does it mean by one other panel,  
4 first of all, Your Honor, I would disagree with  
5 Counsel's characterization of the legislative history.

6                   The statements that we cited, that  
7 Representative Buck made to the House Judiciary  
8 Committee, to me, those are pretty clear.

9 Representative Buck said, there are two -- this is the  
10 amendment that has been agreed to and passed in the  
11 Senate. Now, there are two changes that are made here:  
12 Number one, it eliminates the political language in  
13 regard to the makeup of the appointing Commission;  
14 number two -- and this is where -- it seems pretty  
15 clear to me -- number two, it permits the Governor of  
16 the State of Tennessee to reject the first of the three  
17 members that are sent to him for appointment but  
18 requires that he give them notice and reason as to why  
19 he rejected them, and he must nominate them upon the  
20 second panel that's sent to him.

21                   He can reject the first three; you've  
22 gotta give reason; he gets the last three; he's got to  
23 pick one of the three.

24                   He repeats himself later on -- and this,  
25 Your Honor, is found on pages --

1 THE COURT: 16 --

2 MS. KLEINFELTER: Right, 15 and 16.

3 THE COURT: Yes.

4 MS. KLEINFELTER: He repeats himself,  
5 and he goes on to say he must state the reasons why --  
6 I mean he -- number two is that the Governor of the  
7 State of Tennessee may reject the first three  
8 nominations sent him, he must state the reasons why he  
9 rejects those people, and then he must select from the  
10 second panel.

11 And I think, as we pointed out in our  
12 brief, nothing in the statute or in the legislative  
13 history speaks in terms of it having to be a panel,  
14 reject -- you know, that you can have a different panel  
15 just by changing the composition.

16 I think the language, again, in the  
17 legislative history -- we pointed out the debate, the  
18 discussion, between Governor Wilder and Senator Jordan,  
19 where Senator Jordan proposed, in response to concerns  
20 raised by Senator Cohen, well, instead of sending up a  
21 panel of three, reject, and sending up another panel of  
22 three, let's just send up six names, and he can pick  
23 from one of the six. And Senator Wilder's response is,  
24 no, no, I'd rather have you send up three, reject  
25 those, and then send up three more. Now, you know, how



1 clear can you get that the intent of the Legislature  
2 was, is that the second panel -- that when you reject  
3 the first three, you've rejected those three people,  
4 not a panel but those three people, and that the second  
5 panel has to be three new people?

6 And with respect to the argument that,  
7 well, it defies logic to say that you can reject the  
8 first panel but you have to reject the second panel,  
9 Your Honor, I'd simply point out that is part of --  
10 it's part of that complex system of checks and balances  
11 that the Legislature put in place with respect to the  
12 Tennessee Plan.

13 As counsel pointed out, Article VII,  
14 section four of the Constitution, gives the authority  
15 to the Legislature to fill vacancies as they direct.  
16 That's what they did here.

17 And what they said was, okay, we're  
18 going to give certain power to the Judicial branch by  
19 creating this Commission, we're going to give them  
20 certain power, but the check on that power is the  
21 Governor's ability to reject the first panel that they  
22 nominate, but then the check on the Governor's power is  
23 that if he rejects the first panel, number one, he's  
24 got to give his reasons, and number two, he's got to  
25 pick from the second panel.

1           It's a very complex system of checks and  
2 balances that has been put in place, and for that  
3 reason, it is logical. It doesn't defy logic to say  
4 that you can reject the first panel but have to pick  
5 from the second panel.

6           And with respect to the argument that  
7 the Intervenor, Mr. Gordon, has raised, his position  
8 is, is that you don't have to get to any of all these  
9 other issues if you just look at this one, the  
10 composition of the panel, and when you lose one, that's  
11 it, it's over with, you've got to send another one up  
12 or you've got to start over. Your Honor, I think we've  
13 adequately briefed and discussed that.

14           We would rely upon what we said in our  
15 brief. There's just simply no support in the language  
16 of the legislative history.

17           Your Honor has pointed out the language  
18 in the 17-4-109(d), is it's not mandatory, it is  
19 aspirational, at best.

20           And finally, with respect to the  
21 arguments that were raised by Mr. Lewis with respect to  
22 the Equal Protection violation, again, Your Honor, we  
23 have agreed that -- I mean the rejection here was not  
24 based solely on race, contrary to how Mr. Lewis would  
25 like to characterize it; that it was the lack of

1 diversity that was a motivating factor here.

2 And Mr. Lewis doesn't have -- he does  
3 not have any right of appointment here. At best, he  
4 has a right to be considered.

5 And the Governor didn't say I'm not  
6 going to -- as Mr. Lewis would like to suggest, would  
7 like to have the Court construe it so that it fits into  
8 the confines of the Bakke case, the Governor didn't say  
9 I'm only going to appoint a minority, which would be  
10 the equivalent of a quota or set-aside.

11 What the Governor said was, is I'd like  
12 to have diversity as a factor to consider.

13 And the other thing, he also made the  
14 point, or he --

15 THE COURT: What is the legal  
16 significance, under Equal Protection law, of your  
17 argument that Mr. Lewis does not have a right to  
18 appointment?

19 How does that fit into, I guess, the  
20 essential elements of what he has to show in his Equal  
21 Protection --

22 MS. KLEINFELTER: Well, if he doesn't  
23 have a right to appointment, I think, Your Honor, to  
24 some extent it goes to his whole injury there; I mean  
25 has he been injured if he doesn't have a right to

1 appointment.

2                   And I think to assert a claim under --  
3 because the mechanism for asserting a violation of your  
4 Equal Protection rights is under 1983, which is what  
5 he's done, but you have to have an injury in order to  
6 bring that claim, and if he doesn't have a right of  
7 appointment, then where is his injury? At best, it's  
8 the right to be considered. We would submit that  
9 consideration took place, and that's the only right  
10 that he had there, at best.

11                   THE COURT: Mr. Hicks argued that Mr.  
12 Lewis was never interviewed. If I take that fact into  
13 consideration with the text of Exhibit C to your  
14 Complaint, that we do have a situation of outright  
15 discrimination, not just that race, or, rather,  
16 diversity, was a factor, what's your response to that?  
17 Mr. Hicks --

18                   MS. KLEINFELTER: Right.

19                   THE COURT: -- hinges his argument on  
20 the characterization of this letter, that it is a  
21 rejection based on race. And you said to the Court,  
22 you know, that's not the situation.

23                   Mr. Hicks also pointed out that Mr.  
24 Lewis was never interviewed, and that bolsters his  
25 reading of this letter.

1                   Anything that you want to say about  
2                   that?

3                   MS. KLEINFELTER: Your Honor, I mean I  
4                   think the letter speaks for itself as to what the  
5                   Governor's reasons for rejection -- I mean I think it  
6                   speaks for itself.

7                   There's nothing in the statute that  
8                   requires, of course, the Governor to conduct  
9                   interviews. In fact, again, it goes back to the role  
10                  of the Commission. The Commission is --

11                  THE COURT: I guess really what that is  
12                  is circumstantial evidence. It rounds out what the  
13                  Court should draw from this letter. And that's why he  
14                  mentioned it. It supports his characterization. And  
15                  so -- okay.

16                  MS. KLEINFELTER: Conceivably it does,  
17                  Your Honor, though, you know, the Commission itself  
18                  points out that there were a number of other things  
19                  that they did. There's the issue of statutory  
20                  qualifications that had to be met. And then it --  
21                  actually I think it may be Mr. Gordon who points out  
22                  that there were a number of things that occurred after  
23                  certification was made to the Governor, none of which  
24                  are also -- are all just circumstantial evidence in  
25                  this case.

1           Your Honor, it goes back to what the  
2 Supreme Court, I think, said in the Mayor of -- Mayor  
3 versus the City of -- Mayor of the City of Philadelphia  
4 versus the Educational Quality League case, where the  
5 Court said the type of case that we have here, this  
6 isn't an employment discrimination case, it's not an  
7 admissions case, where -- which are the cases that Mr.  
8 Lewis relied upon. They all dealt with admission  
9 policies in which, in one sense, as we pointed out,  
10 there was a clear set-aside, and we don't have that.  
11 And in the other instance, where the Court struck it  
12 down, you know, they said, well, we're going to give  
13 you extra points because you're a minority.

14           In fact, the one instance where it was  
15 upheld was where diversity was allowed to be a factor  
16 to be considered.

17           But what the Court said in the City of  
18 Philadelphia case is, is that to the degree that the  
19 principles cited by the Mayor reflect concern that  
20 judicial oversight of discretionary appointments may  
21 interfere with the ability of an elected official to  
22 respond to the mandate of his constituency, they are on  
23 point.

24           And it goes on to, you know, acknowledge  
25 that they have recognized, in an even earlier case, the

1 problems that would be involved in a Federal Court  
2 ordering the Governor of a state to exercise his  
3 discretion in a particular way.

4                   And that's exactly what Mr. Lewis has  
5 asked this Court -- a State court, which has similar  
6 problems under separation of powers -- ordered this  
7 Court to exercise -- the Governor to exercise his  
8 discretion in a particular way in making an executive  
9 appointment.

10                   And we point out, Your Honor, we were  
11 not able to find -- and I think the reason why, there  
12 is no case out there, at least one that we were able to  
13 find -- where the Courts have said that the Equal  
14 Protection clause applies to these discretionary  
15 appointments by high-level officials, by elected  
16 officials, is because it shouldn't apply.

17                   Just two other points that I want to  
18 make real quickly, and one is the point that has been  
19 raised -- though I don't know that it was fully fleshed  
20 out but it was certainly raised by Mr. Gordon in his,  
21 the affidavit that was filed this morning that takes  
22 the position that if this Court is not going to make a  
23 determination that that requirement -- that there be  
24 three, is preemptive, then there's a need to do  
25 additional discovery.

1                   And Your Honor, we would submit that  
2 we've had this discussion, the letter speaks for itself  
3 as to what the Governor's reasons were, there's nothing  
4 else in the record. It would be, we would submit,  
5 unprecedented to allow the Commission and the  
6 intervenors to engage in discovery and to go behind  
7 that letter and engage into a deposition or discovery  
8 as to what the Governor's reasons, what his thought  
9 processes were, in making his decision to reject or  
10 appoint. It raises concerns of deliberative process,  
11 executive privilege, as well as separation of powers.

12                   And for that reason, we think the Court  
13 has the material facts before it that are not in  
14 dispute to make a ruling on these summary judgment  
15 motions and there's not a need to go forward with  
16 further discovery.

17                   And the last point we'd like to make, I  
18 told Your Honor we'd get back to you on that remedy  
19 question.

20                   Your Honor, the Commission has made the  
21 very strong point that the Governor should not dictate  
22 to them what they should do. And we've agreed. We've  
23 said that we cannot dictate to the Commission as to who  
24 they ought to pick, what qualifications there ought to  
25 be. We can make requests, we can make suggestions, but



1 we can't dictate.

2 And for that reason, Your Honor, a  
3 remedy that says that you've got to go back and pick  
4 one more, we think, would be essentially us dictating  
5 to the Commission what they have to do.

6 We would certainly hope that the  
7 Commission would recognize the significant public  
8 interest here and would certainly act as expeditiously  
9 as possible.

10 And, you know, presumably, if you take  
11 their position, that they have already chosen that, the  
12 current panel, the second panel, the September panel  
13 contains the three people that they deem to be most  
14 highly qualified, then it shouldn't be that difficult  
15 for them to decide what they want to do, whether they  
16 want to start over or add a third. We just don't feel  
17 like we're in a position to dictate to them what should  
18 happen in the event the Court rules in our favor and  
19 sends it back to the Commission.

20 THE COURT: Thank you.

21 MS. KLEINFELTER: Thank you, Your Honor.

22 THE COURT: That completes the arguments  
23 on cross motions for summary judgment in this case.

24 I thank distinguished counsel for their  
25 patience with the Court in responding to my questions.

1 The papers in this case are excellent, as are the  
2 arguments. Because of that, the Court thinks that it's  
3 realistic that I can issue a ruling by the end of the  
4 week. I have cleared the docket for the rest of the  
5 day to work on this. Tomorrow is not quite that good,  
6 but I'll still devote time to it tomorrow, and I hope  
7 to have a ruling to you on Friday because there is a  
8 great public need for this matter to be handled  
9 expeditiously.

10 That completes the proceedings. Thank  
11 you.

12 (Whereupon, the hearing was adjourned.)  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

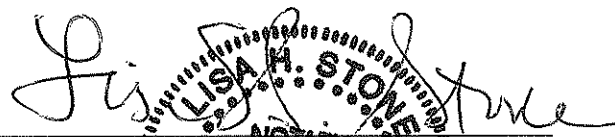
## REPORTER'S CERTIFICATE

STATE OF TENNESSEE )  
 ) ss.  
 COUNTY OF DAVIDSON )

I, Lisa H. Stone, do hereby certify that the foregoing deposition was stenographically recorded by me, the deponent was duly sworn to tell the truth, the whole truth, and nothing but the truth, and that the deposition is a true and correct record, to the best of my ability, of the proceedings.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, nor do I have any interest in the outcome or events of this action.

IN WITNESS WHEREOF, I have hereunto affixed my official seal and signature this 8th day of January, 2007.

  
 Lisa H. Stone  
 Notary Public  
 State of Tennessee  
 My Commission Expires: 1-26-08

